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A SKETCH OF THE SUPREME COURT OF OHIO.

I.

BY EDGAR B. KINKEAD, OF THE COLUMBUS BAR.[1]

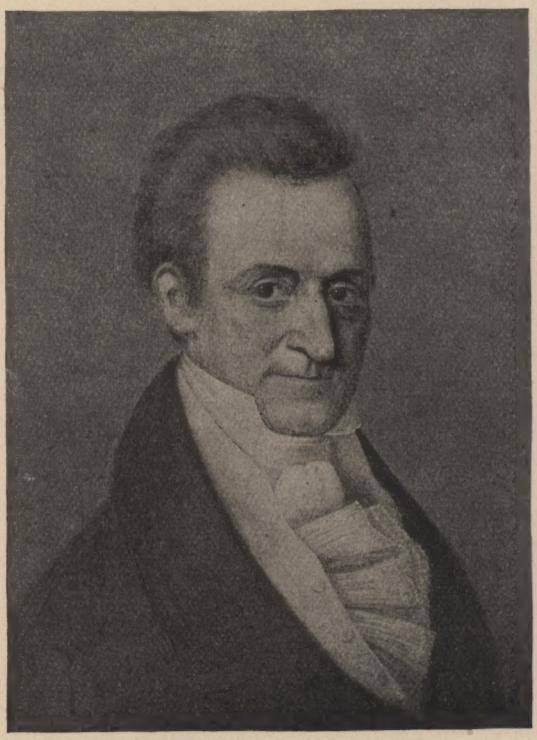
THE subject of this article is "A Sketch of the Supreme Court of Ohio." To attempt to write more than a mere sketch for the purpose intended would be impracticable, and involve much time and research, as a history of the many facts, incidents, and anecdotes connected with the Supreme Court of Ohio and its component parts — the judges — would fill a volume. An yet how interesting and instructive! It may be suggested that there is a vacuity in American legal literature which apparently is not within the power of any one to adequately fill, though there have been slight attempts at preserving interesting and instructive reminiscences of lawyers of great ability. What a field it is! Many members of the legal profession there are who have come and gone, whose lives have been worthy of emulation and example, and filled with characteristics, incidents, and anecdotes, which, if preserved, would guide those who follow. Great lawyers appear in cases which reach the courts of last resort where their briefs are coldly digested for insertion in the report of the opinion of the court, thus forming the only record which may tell the story of their legal lives. How incomplete! But of those of the eminent lawyers who are called to a seat upon the bench of the Supreme Court a little more of their character and ability becomes a matter of record. In no way can some of the most valued items in the history of the lives of such men be preserved than by biographical sketches of deceased judges and lawyers. Thus may the merits and virtues of those eminent in the profession be recorded for the emulation and guidance of those who are to follow them, even long after their names, like their bodies, shall have mouldered to the almost forgotten dead. Obituary addresses delivered by close friends of deceased members of the profession at Bar Association meetings occupy a good field.

When we peer into the history of the great men who have sat upon the bench of the Supreme Court of the Buckeye State, we are unable to catch more than a passing glimpse. "The shades troop about us, and flit hither and thither in shadowy confusion." A man seems just to have reached the point where he is of the greatest use to his people and his country, when he disappears, and another takes his place. So it has been, and so will it ever be. But let us to our task, which seems prosaic enough, though there is a fascination in a measure compensating the labor involved.

We have said "The Supreme Court of the Buckeye State," and indeed, what can be more appropriately connected or associated with the judiciary than the soubriquet "Buckeye," which has been applied for so many years to the State of Ohio, as its origin may

[1] I am greatly indebted to Judge Joseph Cox, of Cincinnati, as well as to my associate in business, Hon. N. R. Hysell, for material aid in the preparation of sketches of judges.

probably be traced to the time when the first court was held at the point of first settlement at Marietta? It is recorded in history that the opening of the first court at Marietta was an event of great moment, and attended with display and ceremony. It was on the 2d day of September, 1788, when the vicinity of the little pioneer settlement was a barren wilderness, and Indians were plentiful. Despite the fact that there was not sufficient cleared space to hold a procession, the sturdy and proud old settlers did not propose to be thwarted in their purpose. They cut a path through the forest to Campus Martius Hall, where the court was held, through which the procession of proud settlers marched. It consisted of the high sheriff with drawn sword, citizens, members of the bar, supreme judges, and common pleas judges. The Indians were interested spectators of this wonderful incident, and were so much pleased with the appearance of the high sheriff with his drawn sword that they called him "Hetuck," meaning in their language the eye of a buck, which was reversed, calling it "Buckeye." And thus originated the soubriquet now applied to the state.



RETURN JONATHAN MEIGS.

A few suggestions upon the importance of the judicial office may not be inappropriate. A lawyer devoted to his profession would, as a rule, rather occupy it than an executive position. No extravagant language is used when we say that there is no official position of more importance. Individual rights rest more largely in the hands of judges than elsewhere. There are the executive, legislative, and judicial departments of government. Of the three, the judicial power is in many ways supreme. The power exercised by the executive, federal or state, sinks into insignificance as compared with that of the judiciary. This view finds support in an historical incident in another state. Judge Gaston, once a noted judge of the Supreme Court of North Carolina, for whose character and attainments Chief Justice Marshall had such regard that he was often heard to say that he would willingly resign, if by so doing he could secure the appointment of Judge Gaston in his stead, was solicited by the dominant party of his state to become United States Senator. This he declined upon the ground that the duties of the post he then filled were "as important to the public welfare as any services which I could render in the political station to which you invite me." History tells of two instances, at least, where the governmental executive and legislative branches have assumed supreme power; but in peaceful times their acts, when found necessary, are controlled by the judiciary. The American executive, legislative, and judicial departments are peculiar to this country, and unlike other governments, are separated

THE SUPREME COURT OF OHIO (1895).

THADDEUS A. MINSHALL. FRANKLIN J. DICKMAN. MARSHALL J. WILLIAMS. JOSEPH P. BRADBURY.
JACOB F. BURKETT. WILLIAM T. SPEAR.

by carefully drawn lines, but are co-ordinate departments of the government. This was the result of the wisdom of the forefathers, fraught with lessons learned from hardships endured in mother countries. This distinction did not exist in other governments, where much confusion prevailed between the various departments. It was therefore natural that the same misconception should to a certain extent pervade the minds of early settlers, and we find that even in the early history of Ohio there were those who clung to the idea that the legislative was the supreme branch, but fortunately were in the minority. The principle of the supremacy of legislative acts found an early grave in the history of Ohio, when it was undertaken to impeach that sturdy, eminent, youthful President Judge of the Third Circuit, Calvin Pease, because he saw fit to assert his judicial independence by pronouncing portions of the act of 1805, defining the duties of Justices of the Peace, unconstitutional. This was indeed a bold stand to take at a time when the question of the power of judges to take such action was not by any means a settled one, not having been expressly conferred by the Constitution. Judge Pease did not have the benefit of the learning of those masters of constitutional law, Marshall, Kent, and Story, but could only look to that unsettled state in other countries. No other country could be looked to for light upon the question, as none had a similar Constitution. That acts of Parliament were beyond attack was well understood. Lord Coke had declared that the power and jurisdiction of Parliament was absolute and not considered within bounds, and Blackstone maintained the same doctrine.[1] Imagine, then, Judge Pease standing alone in a western unsettled state, looking far into the future, fully comprehending the dangers to the American Constitution in failing to uphold the principle that it was the judicial duty to determine whether or not acts were within constitutional limitations! His was a strong mind indeed. He probably fully realized that many of the people of his day were imbibed with the principle of inviolability of legislative acts.

JOHN C. SYMMES.

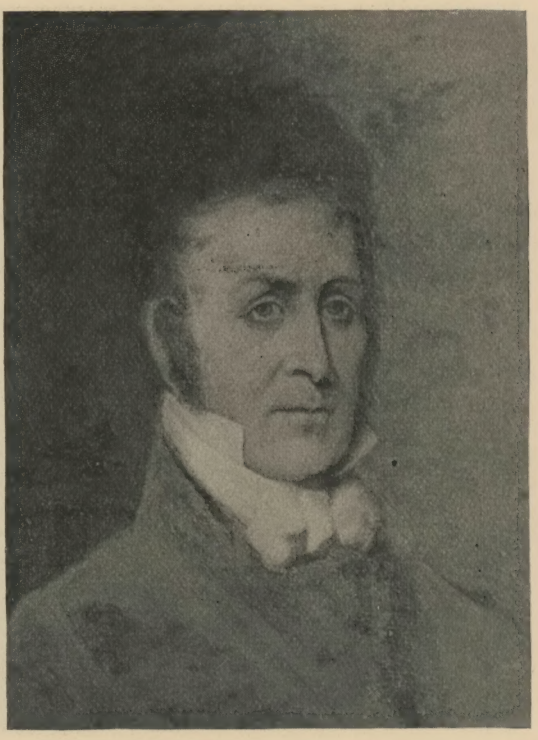
The attempted impeachment of Judge Pease and his associates on the bench for this act demonstrating independence of thought and superiority of the power of the judiciary is one of the most notable recorded acts affecting the Ohio judiciary. And the close call which Judge Pease had in his trial shows how completely the idea of supremacy of legislative power invaded the minds of men at that time. But his acquittal even by a small margin marked one of the most important epochs of principle in the history of the state.

It is reasonable, however, to suppose that Judge Pease and his associates were aware

[1] Chase's Blackstone, 15 n.

of the case of Trevitt *v.* Weedon, decided by the Superior Court of Rhode Island in 1786,[1] which was the first case in which an act of the Legislature was declared void, because it conflicted with the provisions of the state Constitution. These two cases are the only ones in the history of the American judiciary, where attempts were made to impeach judges as criminals for refusing to enforce unconstitutional enactments. The right of the judiciary to declare legislative enactments unconstitutional is not based upon the superiority of the former; but because they are required to declare what the law is, and when the Legislature transcends the limits prescribed by the Constitution, it is then their duty to indirectly overrule the action of the co-ordinate department. (Marbury *v.* Madison, 1 Cranch 170.)

It may now be said that in our license of construing the Constitution, and in the disposition of public opinion, there is no anchor save the Constitution itself. The power of declaring an act of the Legislature invalid because in conflict with the Constitution has even been exercised by a justice of the peace. An instance of this kind once occurred in Washington County, Ohio, where suit was brought before a magistrate for the recovery of a tax assessed upon a dog under a statute which was passed by the Legislature authorizing it. Recovery was denied by the justice, because he deemed the law unconstitutional, and so declared it. The question was thereafter brought before the Supreme Court in Holst *v.* Roe, 39 O.S. 340, where the law imposing a *per capita* tax on dogs was held to be an exercise of police power, and not of the taxing power vested in the General Assembly, so the justice was about half right. It may be presumed that if the justice had been educated in the elastic doctrine of police power, he would have decided the case differently.



ETHAN ALLEN BROWN.

The judicial history of Ohio is marked by four important and interesting epochs: —

1st. The rude provision for protecting life and property before the territorial courts were organized.

2d. The period of territorial courts.

3d. That under the first Constitution of the state, adopted in 1802.

4th. That under the present Constitution, adopted in 1851.

First Epoch. — The first permanent settlement by white persons in that part of the Northwest Territory now embraced in the State of Ohio was made at Marietta, Washington County, April 7, 1788, by forty-seven men, mostly officers and soldiers of the Revolutionary War, and was led by General Rufus Putnam. The spot selected at the junction of the Ohio and Muskingum Rivers was a beautiful one, although then covered by a heavy forest. It had the additional

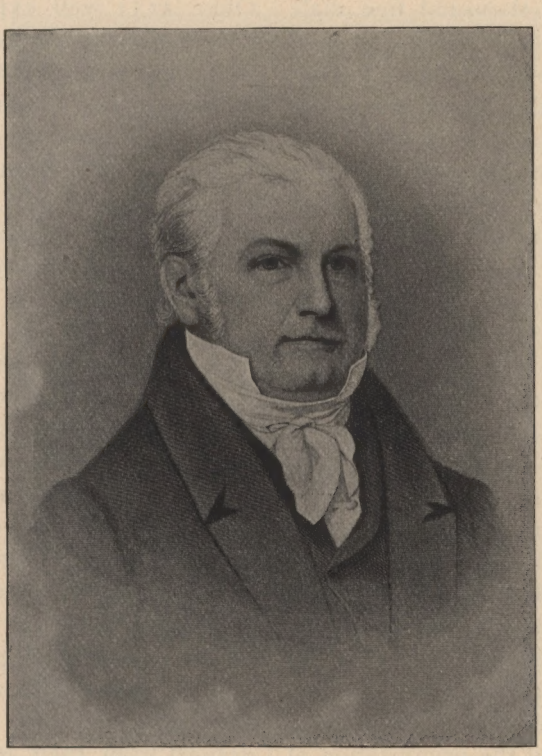
[1] Arnold's History of Rhode Island, Vol. 2, c. 24.

attraction of having been in Justinian's days the site of a large and permanent settlement by people whose only history so far as is written in the high conical mounds, great squares of earth, covered ways reaching to the river in the shape of huge earthen embankments, burial cists, ruins of ancient habitations, memorial and religious mounds, or immense forts of earth or stone.

Some of them are preserved now within the limits of old Marietta.

Around these ancient settlements were numerous Indian tribes claiming the land, and jealous of their rights.

The pioneer settlers were for a short period without local government, and like all settlers in a new country felt the necessity of laws for the protection of their person and property. No steps had yet been taken towards the formation of the government provided by the ordinance of the Territory of the Northwest, and the Governor appointed, General Arthur St. Clair, had not yet arrived. The emigrants were therefore without civil laws or civil authority to enforce them.



CALVIN PEASE.

In this emergency Col. Return Jonathan Meigs, a distinguished Revolutionary officer, who had crowned a long series of brilliant actions in that war by his distinguished bravery in storming Stony Point with Gen. Anthony Wayne, was selected to draw up a system of regulations, which were adopted by the emigrants as their rule of conduct and protection until the proper authorities should arrive.

To give these regulations publicity, a large oak tree standing near the confluence of the rivers was selected from which the bark was peeled of sufficient space, and on it the written regulations were nailed. Colonel Meigs was selected as the authority to enforce them, and for that purpose was unanimously invested with full power. This is a striking illustration that in whatever condition man is placed the necessity of some form of government is felt.

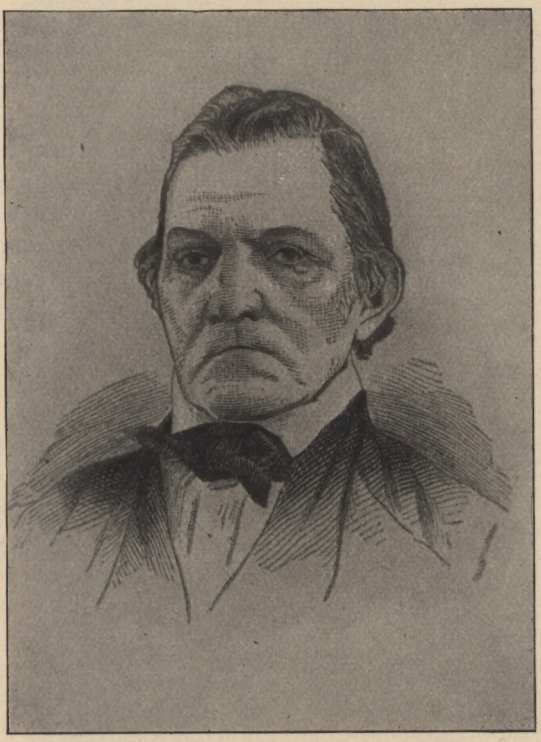
As a strong evidence of the good character of the people it is said that during the three months of the existence of these rules, but one difference arose among the people, and that was compromised. This well justified the assertion of President Washington "that no colony in America was ever settled under such favorable auspices as that which has just commenced at the Muskingum. Information, property, and strength will be its characteristics. I know many of the settlers personally, and there never were men better calculated to promote the welfare of such a community." The same kind of provision for protection was made at Cincinnati, and William McMillan appointed to enforce them. There was, however, but one prosecution under them, and that was of a party for robbing a garden of some vegetables, and he received as punishment ten lashes.

Second Epoch: Territorial Government. — The ordinance of Congress "for the government of the territory of the United States Northwest of the river Ohio" was passed on the 13th day of July, 1787, and was the fundamental law of the territory. It provided for the appointment of a governor and three judges to whom legislative power was delegated until the population of the territory should reach five thousand free male white inhabitants of full age, when a general assembly was to be then organized. During the period, when the legislative power was vested in the governor and judges, there were so many contests between the three legislators that the people became very much dissatisfied, and consequently welcomed the day when they could have a voice in the affairs of the government. The ordinance did not provide whether the Governor had more or equal power with the judges in legislative matters. Gov. St. Clair claimed superior power, which was frequently exercised by him. Their power, however, was very much restricted, the ordinance providing that: "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress, but afterwards the Legislature shall have authority to alter them as they think fit." The governor and judges commenced their legislative duties in 1788. It was no easy task under the restrictions placed upon them to enact a consistent code, one suited to the wants and necessities of the people. In some instances, original statutes were enacted and published to complete what they deemed to be a proper system of laws, and these were considered as of doubtful character. In subsequent years, when individual rights became dependent upon them, it was a matter of some delicacy as well as a difficult task for courts, when called upon to place a construction upon some of the earliest legislation, and determine its validity. This duty, however, could not have been imposed upon a wiser head than Peter Hitchcock, upon whom a portion of the responsibility was placed. Judge Hitchcock (in Ludlow *v.* Heirs, 3 Ohio, 555) well expressed the difficulties encountered in the formation of a new state, when he said: "To prepare laws which shall meet the exigencies of a people collected not only from every state in the Union, but also from almost every country in the civilized world, is no easy task. People coming together in this manner, and forming a new society, will entertain different views of policy according to the prejudices which they may have imbibed in the different countries from whence they emigrated. When to this circumstance is added the consideration of the limited nature of that power, which was delegated to the first legislative authority in the territory northwest of the river Ohio, it is not surprising that there should be some apparent inconsistency in their acts. It is much to be regretted that the only evidence we have of the construction given to the early statutes by the courts, at or about the times these statutes were adopted or passed, is derived from their records and from loose tradition."

The first judges appointed under the ordinance of 1787 were John Armstrong, Hon. Samuel Holden Parsons, and James Mitchell Varnum, who constituted the first Supreme Court of the territory. John Armstrong did not accept, and never served as judge, and John Cleves Symmes was appointed in his stead. Inferior to this court were the county court, courts of common pleas, and the general quarter sessions of the peace. Single judges of the common pleas, and single justices of the quarter sessions were clothed with certain civil and

criminal powers to be exercised out of court. The judges who succeeded Parsons and Varnum were S. H. Parsons, John Cleves Symmes, and William Barton.

In September, 1789, George Turner was appointed in place of Mr. William Barton, who declined. In March, 1790, Gen. Rufus Putnam succeeded Judge Parsons, deceased, and Joseph Gilman was appointed in place of General Putnam, who had been appointed Surveyor-General of the United States lands in December 22, 1796. On February 12, 1798, Return J. Meigs, Jr., was appointed in place of George Turner, resigned. Judge Symmes occupied the bench during the life of the territorial court prior to the first territorial Legislature, and with Gilman and Meigs occupied the bench at the meeting of the convention of the territorial Assembly.



JACOB BURNETT.

The act establishing the territorial Supreme Court was passed by Gov. St. Clair, John Cleves Symmes, and George Turner, June 6, 1795, and published at Cincinnati, being adopted from the Pennsylvania Code. It provided that: "There shall be holden and kept, twice in every year, a Supreme Court of record, which shall be called and 'stiled' The General Court; the sittings of which court, to commence at Marietta, in the county of Washington, on the third Tuesday of October, yearly and every year; and on the third Tuesday of March, at the town of Cincinnati, in the county of Hamilton, yearly and every year. And the judges of said court and every of them shall have power and authority, when and as often as there may be occasion, to issue forth writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process, returnable to the said court, and grantable by the judges by virtue of their office." While this court was authorized to review all decisions of inferior tribunals, no appeal could be taken from its judgments and decrees. The judges spent equally as much time in their saddles as upon the bench. They together with the court officials and lawyers traveled on horseback from court to court, carrying with them blankets, horse-feed, and food for themselves, camping out in the wilderness at night. There were neither taverns, bridges, nor even roads in their route. They traveled from Cincinnati to Marietta. Returning from thence to Cincinnati, they would then go through the forests to Detroit, being out many days on a single journey. One of the principal points to be observed in purchasing a horse was whether or not he was a good swimmer.

A most excellent precedent was established by the governor and judges in a resolution passed by them, August 18, 1795, as follows: "Resolved, That where persons sufficiently learned in the law can be found

to fill the benches of the courts of common pleas, it would be the safer way to commission them during good behavior." Ohio has not clung to the theory of long judicial terms as closely as have other states. One of the English judges not long ago frowned upon an American decision, because he said the terms of the judges were too short to insure good decisions, and hence English judges would not follow American decisions. That is too bad indeed. But the English judge is not altogether right, as in some states, and especially in the United States Courts, the judges have remained on the bench longer than have some English judges. The term of judges of supreme courts should not be less than ten years.

Third Epoch: Under the First Constitution of 1802. — In 1802 the eastern division of the territory of the United States northwest of the river Ohio became a State, the people in convention assembled at Chillicothe adopting a Constitution on the 29th day of November, 1802, by virtue of which the judicial power of the state, both as to matters of law and equity, was vested in a supreme court, courts of common pleas for each county, in justices of the peace, and in such other courts as the Legislature might establish. The Supreme Court consisted of three judges, any two of whom constituted a quorum, the General Assembly being authorized to add another judge thereto after the term of five years, in which case the judges were authorized to divide into two circuits, within which any two of the judges could hold court. They were to be appointed by a joint ballot of both houses and to hold their office for a term of seven years if they so long behaved well.

The old Supreme Court was the successor of the territorial court. Briefly referring to the territorial epoch of the sketch, in forming the connecting link at this point, it will be remembered that the ordinance of 1787 provided for the appointment of judges to form a court with common law jurisdiction.[1] The Governor and judges of the North-western Territory, by act of August, 1788, denominated this a general court and provided for its sittings.[2] The act of August, 1795, provided for holding a term of this court at Marietta and one at Cincinnati, in each year, for *nisi prius* courts for the trial of issues of facts.[3] The act of 1800 provided for the transmission of the records with the postea endorsed and other proceedings necessary for the rendition of judgments to the General Court.[4] After the state was organized in 1802, the state legislature of April, 1803, abolished the General Court, and vested a portion of its jurisdiction in the Supreme Court, and transferred to it the judgments unsatisfied in the General Court.[5] By virtue of this transfer the records remained in the Supreme Court of Hamilton County.[6]

Generally, and for most purposes, the old Supreme Court was a county court, not perhaps altogether so,[7] it being held in Seely *v.* Blair (6 Ohio, 448) that although the Constitution required it to be held in each county in each year, yet there was no territorial limitation upon its authority, and it exercised certain functions operating beyond the county in which it might be then sitting.[8] Its jurisdiction was varied, having concurrent jurisdiction with courts of common pleas to issue writs of error and certiorari ;[9] and the act[10] organizing courts gave original jurisdiction to the Supreme Court in all civil cases, both at law and equity, where the matter in dispute exceeded one thousand dollars, and appellate jurisdiction from the court of common pleas in all civil cases in which that court had original jurisdiction.

It had no power to direct proceedings in

[1] 1 Chase, 67. [2] 1 Chase, 97. 1 Chase, 149. [4] 1 Chase, 359. [5] W. 612; 1 Ohio, 317; 3 Ohio, 483; 1 Chase, 359. [6] 1 Chase, 359; 1 O. 317; 3 O. 483. [7] Wayne Tp. v. Green Tp. W. 292. [8] 6 Ohio, 448; 5 Ohio, 249. [9] Barnes *v.* Decker, W. 207. [10] Swan (1841) 222, 43 Ohio Laws, 81, sec. 9.

quo warranto,[1] could not stay the execution of a decree, except upon a bill of review,[2] had no jurisdiction in probate matters,[3] was without power to allow or dissolve an injunction,[4] or enjoin proceedings in chancery in the common pleas courts.[5] It was held by the court in 1849, that its original jurisdiction in cases at law was taken away by the act of March 12, 1845.[6]

REUBEN WOOD.

In the twenty-ninth year of the life of the state the need was felt for a reviewing court, pure and simple, so that uniformity of decision should prevail for future precedent and guidance. The Legislature, therefore, in its wisdom, passed an act, March 10, 1831, establishing what was termed a Court in Bank. This required the judges to hold a general session at Columbus once each year for the hearing of causes which had been reversed by the judges upon the circuit. From this enactment dates the first court of last resort, as now regarded, in the state, at which time the first steps were taken towards official reporting of adjudications. Those who have not made a close study of the judicial history of the state may not have an adequate conception of the vast amount of work accomplished by the judges under the Constitution of 1802, or of the great importance of the decisions made by them. The most important and difficult task of formulating the foundation of the system of law for the future development and establishment of one of the four greatest states of the Union fell to the lot of the thirty jurists whose fortune it was to occupy the supreme bench from the formation of the state to the date of the adoption of the Constitution of 1851, when the modern and perfect code system of practice and procedure was inaugurated which marks the fourth and last epoch of this sketch.

Can we comprehend the magnitude of the task performed by those early expounders of our judicial system, considering the importance of principles of law established, independently of manual labor involved? Only the close student of the early Ohio decisions can fully appreciate it. Each state in a large measure is independent of its sister state so far as concerns its system of law. In the establishment of a system of law, one state may lean upon an elder sister state and on the mother country; but the circumstances, conditions, and demands of its people may require the adoption of different principles, and thus was independence of thought required. The rules of law of other jurisdictions having no binding force or validity *per se* within a state until adopted, the duty was therefore imposed upon the early judicial bench of last resort to make

[1] Ohio R.R. Co. *v.* State, 10 O. 360. [2] Way *v.* Hillier, 16 O. 105. [3] Jos. Hunter's Will, 6 O. 499. [4] Griffith *v.* Commissioners, 20 O. 609. [5] Merrill *v.* Lake 16 O. 373. [6] Vol. 43, p. 81, Sec. 9; 7, W. L. J. 221.

such discriminations as seemed essential to meet the wants and requirements of the people with whose rights they were dealing. The difficulty experienced in performing this duty can be the more fully realized when the fact of the scarcity and lack of books and libraries which existed in earlier times is considered.

Going back to Blackstone's time we read of provincialisms, which have no place in the present age; but we must remember that the limitations upon this doctrine must be prescribed by each new country for itself; and the great western portion of the United States, at the time of the first settlement of the Northwestern Territory, was indeed a new country. The states from which came the pioneers of our state may have determined many questions of law, but it was necessary for Ohio to settle them for itself, simple though they may be. Thus we find one of Ohio's greatest jurists, Peter Hitchcock, at a very early date discussing a question which at present is considered elementary, but had to be first settled in the then infant state. The point cannot be more aptly illustrated than by a quotation of Judge Hitchcock's language in Commissioners *v.* Butt (2 Ohio, 351), when he said: —

"Whenever a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. It is undoubtedly correct that such should be the case. But to adhere blindly to English decisions when no good reason can be assigned for them, or when no other reason can be assigned than that it has been thus decided, to do this without inquiring whether the same reasons exist in this country as in that, would be foolish in the extreme. It is a useful maxim that when the reason of a law ceases, the law itself should cease. A particular law or rule of law might be very beneficial in England, or in one of our sister states, which, if enforced in Ohio, would be attended with injurious consequences. Influenced by these circumstances, this court has ever been in the habit of looking to the effect which would follow the adoption of any particular rule or decision."

Further illustrating the ideas suggested, quotation is also made from Judge Hitchcock in Morris *v.* Edwards (1 Ohio, 208), where, in discussing the rule of construing contracts, he said: —

"It must be recollected also that this court, in giving construction to contracts, cannot interpret the same terms or word made use of in contracts to mean one thing in one part of the state, and a different thing in another. The rule of law must be uniform with the whole body of the people. The same words used in a grant would convey an estate of inheritance in the county of Trumbull or Hamilton, and it will not be contended that if by general consent of the inhabitants of the county of Trumbull should attach a meaning to those terms which in a grant convey an estate of inheritance, different from that which the law attaches, that the court would be justified in changing the interpretation of those terms to meet the feelings, wishes, or general consent of the people in that particular section. In interpreting contracts, the law of the place where the contract is made is to govern. But in what does the law of Cincinnati and its vicinity differ from the law in Cleveland or Steubenville? We are called upon to know certain facts of public history, which must go to change these principles in that particular section of the country, so far that a rule of law is to prevail different from that which prevails in other parts of the state. If this be correct . . . agreements containing precisely the same terms, and relating to the same subject-matter must be construed to mean different things, according to the understanding of the people in the various counties, or even towns in which they shall be executed. . . . This is carrying the rule that the *lex loci* must govern to an unreasonable length."

As an infant learns its A B C's, so was it necessary that the infant state authoritatively settle the elementary questions for itself. And so could we proceed, referring to many questions of like character showing the great scope of questions which the early judges had to adjudge in the formulation of the jurisprudence of the state. It is but natural that the question raised in the last above-mentioned case should have been made when we reflect for a moment that the judges and lawyers of those days were compelled to travel upon horseback for days in going from court to court, when the distances seemed very great, in the then undeveloped state, — greater indeed than in Blackstone's country; for in the present age of railroads, telegraphs, and telephones, it is impossible to realize distances, as before these means of travel and communication were established.

JOHN McLEAN.

When we reflect, therefore, upon the questions which the early judges had to encounter, without the aid of the books as now (for instead of being able to touch the button and have any law-book in existence laid on their desk in a moment, they had to travel miles to see and examine them), and when we consider the fact that they had to travel from county to county, spending as much time in the saddle as on the bench, we may have a slight conception of the labors by them performed. Judge John C. Wright, in his preface to his reports, says upon this subject: —

"The duties imposed upon this court are so great as to make relief necessary, for it would be difficult to find men of sufficient physical ability to perform the labor. These judges," he says, "now hold court in seventy-two counties each year, requiring twenty-two hundred and fifty miles' travel."

They who still remain to tell us of those days are now few in number, and unfortunately the pages upon the annals of history fail to enlighten us. The meagre incidents and anecdotes found in the biographies of the early judges are the only traces left.

Fourth Epoch: Constitution of 1851. — In its forty-ninth year as a state, the necessities of its inhabitants demanded a change in the judicial system. Consequently, the Constitution of 1851 was adopted by a vote of the people, on the third Tuesday of June, 1851, which took effect September 1st, 1851.

The new Constitution did not create a new state. It only altered, in some respects, the fundamental law of a State already in existence, and this was done pursuant to the old Constitution of 1802, under the provisions of which the convention was called, and the new Constitution framed. It followed, therefore, that all laws in force when the Constitution of 1851 took effect, which were not in conflict or inconsistent with it, remained

in force without an express provision to that effect, and that all inconsistent laws fell simply because they were inconsistent, or all repugnant laws were repealed by implication. It was essential, however, that the repugnancy causing a law to fall should be necessary and obvious; if by any fair course of reasoning the law and the Constitution could be reconciled, the law stood.[1]

It stipulated that the Supreme Court should, until otherwise provided by law, consist of five judges, a majority of whom, competent to sit, should be necessary to form a quorum or to pronounce a decision, excepting in the event of an increase of the number, when all of the judges of a division hearing a case did not concur as to the judgment to be rendered, or whenever a case involved the constitutionality of an act of the General Assembly or of an act of Congress, it should then be reserved to the whole court for adjudication.[2] The General Assembly was authorized to increase or diminish the number of judges of the Supreme Court, and to establish other courts,[3] whenever two-thirds of the members elected to each house concurred therein; but no such change, addition, or diminution can vacate the office of any judge;[4] and such concurrence will be presumed, as every reasonable intendment is made in favor of the correctness of legislative proceedings.[5] In case of the creation of any additional court, the judge must be elected, as the Constitution[6] requires that all judges other than those provided in the Constitution shall be elected, as it is not within the power of the Legislature to clothe with judicial power any officer or person not elected as a judge.[7] Provision may, however, be made for the election of a successor to any such additional judge, but in the absence of words clearly indicating such purpose, no such election is authorized.[1] This relates to the office of any judge created by the Constitution because it has not limited the power of the General Assembly to abolish courts created by the Legislature, nor its power to vacate the office of judges of such courts.[2]

The Constitution required the judges of the Supreme Court to be elected by the electors of the state at large, for such term, not less than five years, as the General Assembly may prescribe, to be elected and their official term to begin at such time as may be fixed by law. In case the General Assembly increases the number of such judges, the first term of such additional judges must be such, that in each year after their first election an equal number of judges of the Supreme Court shall be elected, except in elections to fill vacancies; and whenever the number of such judges shall be increased, the General Assembly may authorize such court to organize divisions not exceeding three, each division to consist of an equal number of judges: for the adjudication of cases, a majority of each division constituting a quorum, and such an assignment of the cases to each division may be made as such court may deem expedient.

In case the office of any judge becomes vacant before the expiration of the regular term for which he was elected, the vacancy is filled by appointment by the governor, until a successor is elected and qualified; and such successor must be elected for the unexpired term at the first general election after the vacancy occurs. (Art. 4, sec. 13, Const.)

The court was required to hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law.

[1] Cass *v.* Dillon, 2 O. S. 607.
[2] Art. 4, Sec. 2 Const.
[3] Art. 4, Secs. 1 and 15.
[4] Art. 4, Sec. 15. (a) Logan Branch Bank ex-parte, 1 O. S. 432. (b) State *v.* Comers, 35 O. S. 458; Peters *v.* McWilliams, 36, O. S. 155. (c) Campbell *v.* Corney, 5 W. L. B. 516, 76 O. L. 256.
[5] Miller *v.* State, 3 O. S. 475. [6] Art. 4, Sec. 10.
[7] Logan Branch Bank ex-parte, 1 O. S. 432.

[1] State *v.* Brown, 38 O. S. 344.
[2] State *v.* Wright, 7 O. S. 333.

The new Constitution also authorized a commission of five members to be appointed for the term of three years from and after the first day of February, 1876, to dispose of accumulated business, having like jurisdiction with the regular court. Upon application of the Supreme Court the General Assembly may, not oftener than once in ten years, provide for the appointment of other commissions. Two commissions have been appointed under this provision, — one in 1876, concluding its labors in 1879; another in 1883, concluding its labors in 1885; and yet the dockets of the court continued and continue to be crowded, of which more will be said later on.

These were the changes under the present Constitution.

We are constrained to digress from the subject for the purpose of referring to one important change wrought by the new Constitution in the administration of justice. Indeed, it was one of the most important features in the judicial history of the state, and was participated in by one who was at one time a judge of the Supreme Court — Judge Kennon. Article 14, sections 1, 2, and 3 of the Constitution provided that the General Assembly should appoint three commissioners to revise, reform, simplify, and abridge the practice of pleading, forms and proceedings of the courts, and abolish the distinction between actions at law and equity, and report to the General Assembly for action. This was the first step taken towards the establishment of a code system of procedure. William Kennon, William S. Groesbeck, and Daniel O. Morton were appointed commissioners, and reported what was known as the Code of Civil Procedure to the fiftieth General Assembly; and that body, on March 11, 1853, adopted it, which has remained with but little change to the present as the Ohio Code. The most important feature connected with the life of the Code was the revision and consolidation made by the thorough and capable members of the bar appointed for that purpose in accordance with the act of the General Assembly passed March 27, 1875. The commissioners appointed for this purpose were Michael A. Dougherty, Luther Day, and John W. Okey. Judge Day was a member of the commission only about a year when he was appointed a member of the Supreme Court Commission, and John Brasee was appointed in his place. Judge Okey was a member for two years when he was elected a judge of the Supreme Court, and George B. Okey, a very able son of an able father, was appointed to complete the important work begun by his father. This commission suggested in their report that there be no change made in any part of it, unless clearly necessary. "In this way," they said, "the Ohio Code will become stable, and the

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fruits of this undertaking be preserved for a great number of years;" and so has it been.

The great service rendered by Judges William Kennon, John W. Okey and Luther Day in the formulation and revision of the Code is worthy of special mention.

The judges, therefore, who were on the bench when the Code system was inaugurated, and those who came on for a few years subsequently, like the early judges when the state was formed, had new and important problems to determine, as it became their duty to see that the procedure was started right. All was not harmony upon the adoption of the Code. The system seems simple enough now, but the change was bitterly opposed, and the system little understood at first; its staunchest friend was Judge Joseph R. Swan, whose opinions while a judge of the Supreme Court contain able expositions of many of its provisions. There probably never was a man in Ohio who had a clearer conception of the two systems, and the profession are more largely indebted to him for his services as judge and author than to any other man. The purpose of his work on pleading was to clear the confusion which existed in the minds of the profession, and although not so pretentious as other works, it ranks much higher in many respects.

Concluding this branch of the sketch we come to the much mooted question of Relief of the Supreme Court. For many years the crowded condition of the docket has been a grave problem, difficult of solution. For a number of years members of the Bar of Ohio have been discussing the question, and nowhere has it been more thoroughly considered than at the meetings of the State Bar Association held annually. But it seemed more difficult for that body to arrive at a conclusion than it is for a jury to agree upon complicated questions of fact after listening to able arguments of brainy barristers. Some there were who wanted to put up a fence high enough to keep a certain class of litigants out of the court of last resort. In other words they desired to have a limitation in the amount involved in an action prescribed, so that those whose controversies did not reach the prescribed limit would have been prevented from having one more chance of fighting their battle over and from procuring the opinion of the highest tribunal. Such a provision would often have prevented the determination and final adjudication of grave and important questions on the sole ground of an insufficiency of an amount involved. Such a proposition needs but to be stated to be repudiated by all fair-minded men, and would have been wholly in disregard of the principle enunciated at the opening of the first court, when it was declared that the court was opened for the administration of even-handed justice to the poor and to the rich, without respect to persons. Another class entertained the opinion that the court should be increased in number, and divided in sections. Consequently in the year 1892 the Legislature was prevailed upon to pass and did pass an act, as an experiment, providing for an increase of *one* judge, requiring the court to divide into two sections of three each. But the law has not at this date been placed in practical operation, because the Legislature failed to provide proper conveniences for holding two courts, and the court continues to work as before. The addition to the court, however, has had the effect of facilitating the work in various ways. If we were to express any view upon the subject of reform, it would be the hope that the court continue working as it now is until the legislature increase the court to ten judges, divided into two divisions of five each. There is nothing to be gained by a division of the present number as designed by the present law, except, possibly, a greater amount of work, and that is not all that must be considered. Each suit has already been passed upon by the Circuit Court of three members.

A CURIOUS WILL.

AN English paper vouches for the authenticity of the following extraordinary will.

On the 19th of August, 1784, at the Court of Bailiwick, in the town of D——, was read and published the last will and testament of M. Fortune Ricard, a teacher of arithmetic; and this curious and lengthy document contains the most gigantic bequests ever left by mortal man. A brief summary of some of its salient features is here appended. After private bequests, the testator proceeds to deal with a separate fund of 500 livres = £22 of English money.

"This sum," says he, "proceeded originally from a present which was made me by Prosper Ricard, my much-honored grandfather, when I entered the eighth year of my age. At that age he had taught me the principles of writing and calculation. After having shown me that a capital, with its accumulating interest of five per cent, would at the end of 100 years amount to more than 131 times the original sum, and seeing that I listened to this lecture with the greatest attention, he took twenty-four livres (a guinea) out of his pocket, and addressed me with an enthusiasm which is still present to my mind.

"'My child,' he said, 'remember whilst thou livest, that with economy and calculation nothing is impossible to man! Here are 24 livres which I give thee. Take them to a merchant in our neighborhood, who will place them in trade, out of regard for me. Every year thou shalt add the interest to the principal. At thy death thou shalt employ the produce in good works for the repose of thy soul and my own.'"

In his seventy-first year M. Fortune found that the 24 livres had grown to 500, and disposed of them as follows: —

First, they were to be divided into five equal portions of 100 livres each, and each several portion put out to interest in the same way as the original 24. These were then to be employed as follows: —

1. In 100 years the first sum of 100 livres would amount to 13,100 livres (£5,822). From this a sum of £1,500 was to be given for the best theological dissertation proving the lawfulness of putting money out to interest. Further, three medals were to be given, and the rest of the money spent in printing and circulating the essays.

2. After 200 years the second sum, amounting to 1,700,000 livres (£756,500), was to be employed in establishing a perpetual fund for fourscore prizes of 1,000 livres each: 15 prizes for the most distinguished virtuous actions, 15 for works of science and literature, 10 for arithmetical solutions, 10 for agricultural science, 10 for masterpieces in fine arts, 10 for athletics, etc.

3. After 300 years the third sum, increased to 226 millions (£10,057,000), to be used: 196 millions to establish in the most populous places in France 500 patriotic banks for lending money without interest, the largest with a capital of 10 millions, the smallest of 100 thousand livres. The remaining 30 millions to found museums at Paris, Lyons, Bordeaux. Rouen, Rennes, Lille, Nancy, Tours, Dijon, Toulouse, Aix, and Grenoble. Half a million livres to be spent on each building and grounds, and an income of 100,000 livres to be annexed to each — with a staff of forty literary men and artists of superior merit, "who, at the time of meals, shall be divided into four tables, that their repast may be cheerful without being too noisy"! Free libraries, galleries of natural history, concert halls, theatres, free lectures, are all provided for in this wonderful and comprehensive scheme.

4. At the end of 400 years the fourth sum, amounting, with interest, to 30,000

millions (£1,330,000,000), to be employed in building 100 towns, to accommodate each 150,000 souls, in the most agreeable situations to be found in France. As the testator recognizes that all the specie in Europe would not reach this amount, it is left to the discretion of the executors to buy land and real estate.

5. Finally, with regard to the last sum of 100 livres, amounting nearly, with the accumulation of 500 years, to four millions of millions of livres (136,000,000,000 sterling): six thousand millions to be employed in paying off the National Debt of France, "upon condition that the kings shall be entreated to order the comptrollers-general of the finances to undergo, in future, an examination in arithmetic, before they enter upon their office"; twelve thousand millions of livres (£525,000,000) to pay off the National Debt of England.

"It may be seen," says this astute and far-seeing philosopher, "that I reckon that both these National Debts will be doubled in this period; not that I have any doubts of the talents of certain Ministers to increase them much more, but their operations in this way are opposed by an infinity of circumstances which lead me to presume that those debts cannot be more than doubled. Besides, if they amount to a few thousand of millions more, I declare that it is my intention that they should be entirely paid off, and that a project so laudable should not be deferred for a trifle, more or less.

"I beg that the English would not refuse this slight mark of the remembrance of a man, who was indeed born a Frenchman, but who sincerely esteemed their nation. . . . I earnestly desire that, as an acknowledgment of this legacy, the English nation will consent to call the French their neighbors, and not their natural enemies, that they may be assured that Nature never made man an enemy to man; and that national hatreds, commercial prohibitions, and, above all, wars constantly produce a monstrous error in calculations."

Into the further legacies we do not propose to enter — they include funds for the encouragement of peace, the extinction of State lotteries and sinecure offices, for the increase of priestly stipends — "on condition that the clergy forego their fees for saying masses"; for bringing waste lands into cultivation, for education, for public or municipal houses of labor, where any who demand work shall have it; for hospitals; for the furtherance of the employment and proper remuneration of women, etc.

A modest residuum of some three millions of millions odd livres is left to the discretion of the executors — six in number — who are to be replaced perpetually on the death of any one by the votes or nomination of the survivors. These gentlemen receive nothing from the first sum, but at the end of the second hundred years there is a sum of 125,000 livres unappropriated; of the third, 711,000; of the fourth, 32,000,000, which sums they are requested to accept as a compensation for their expenses and trouble.

The will concludes with the following characteristic paragraph: —

"May the success of these establishments cause one day a few tears to be shed on my grave! But above all, may the example of an obscure individual kindle the emulation of patriots, princes and public bodies; and engage them to give attention to this new but powerful and infallible means of serving posterity, and contributing to the future improvement and happiness of the world!"

WILLIAM ATWOOD,

CHIEF-JUSTICE OF THE COLONY OF NEW YORK, 1701–1703.

By Charles P. Daly, LL.D.,

Ex-Chief-Justice of the New York Court of Common Pleas.

I.

TOWARDS the close of the seventeenth century, the vessels of the notorious pirates known as the Red Men, which then infested the East Indian seas and were the terror of the maritime world, sailed under commissions granted to them ostensibly as privateers, by Fletcher, the governor of the Colony of New York. The place of retreat of these sea robbers was the island of Madagascar, whither their booty was brought, but their vessels were fitted out, manned, and equipped in the port of New York, and New York merchants furnished them regularly with supplies, sending out vessels to Madagascar loaded with everything that these marauders required, and bringing back in exchange bullion, spices, and costly Indian fabrics, together with slaves, procured upon the coast of Africa, which was visited upon the return voyages. New York was, in fact, at the time, a nursery of piracy, which the British government determined to put an end to, and for that purpose it removed Fletcher from the office of governor, and sent out in his place Lord Bellamont, a man of capacity, integrity, and military experience.

At first Bellamont was unable to accomplish anything, either through the indifference or the incapacity of Chief-Justice Smith, who had not been bred to the law, and the corruption of James Graham, the Attorney-General, who was in league with the merchants in keeping up this infamous traffic, by which several of them acquired large fortunes. Bellamont wrote to the home government that, in spite of all his endeavors, piracy would continue in New York for the want of good judges and an honest attorney-general, and suggested that a chief-justice and an attorney-general, who were barristers, should be sent out from England; for Graham, like the Chief-Justice, was not an educated lawyer, and in addition to being corrupt, had not the professional knowledge that was requisite for the proper discharge of the duties of his office. The government acted upon Bellamont's suggestion, appointing in 1701 William Atwood, Chief-Justice, and Sampson S. Broughton, Attorney-General; and in view of the part which these men had in the troublesome events that followed, it will be appropriate to state what is known previously respecting them.

Atwood was a man of a good family, of the manor of Littlebury and Rickenhoe in the county of Essex. He was one of two sons of John Atwood of Broomfield, in Essex. It appears by the record of the license for his marriage in 1678 to Mary Leigh, that he was a fellow of Gray's Inn, and by the records of the Inn that he was admitted a member of that body in 1669; was called to the bar in 1674, and in that year was master of the revels in the Inn.[1]

Whether he had acquired any prominence in the courts as a practitioner I have been unable to ascertain, beyond the fact that the

[1] Morant's History of Essex, Vol. I., 155; id., Vol. II.; Chelmsford Hundred, p. 78; Wright's History of Essex, Vol. I., p. 367; Register of the Marriage Licenses of the Vicar-General of the Archbishop of Canterbury, from 1660 to 1700; Harlein Coll., Vol. XXIII., p. 293; Harlein Coll., Vol. XIII., p. 338; Foster's Registers of Admissions to Gray's Inn, from 1521 to 1881, p. 24.

writer in 1811 of a note to Howell's State Trials, says that in 1688 he "was a very considerable man in his profession," and Atwood's own statement, after he came to the colony, that he was not unknown in Westminster Hall and at the Bar of the House of Lords.[1] However that may have been, he had, at the time of his appointment, become somewhat known as the author, during the twenty years preceding, of publications upon a variety of subjects, legal, historical, political, and theological.[2] In 1680 he published a tract entitled *Juri Anglorum Facies Nova* (A New Face to the English Law), which was of sufficient importance to induce Dr. Brady, the historian, to reply to it, — a man whose writings had been largely devoted to establishing that all the liberties of the English people were concessions from the crown, and who then represented the University of Oxford in Parliament. The next year, 1681, a tract of a legal historical character by Atwood appeared, entitled *Jus Anglorum ab Antique* (The English Law from of Old); and the following year he published another, to show that William the Conqueror made no absolute conquest of England, in the sense of modern writers.[3]

Another publication, in 1689, was in connection with an event upon which the public mind had been greatly excited. Among the acts of James II. against the liberties of the people of England, none were more arbitrary than his removing four of the judges of the King's Bench, that he might obtain from that tribunal the decision shortly afterward given by it in Sir Edward Hale's case, that he was an absolute sovereign, that the laws of England were the king's laws, that he had the power to dispense with any of them whenever he saw a necessity for it, he alone being a judge of that necessity. Chief-Justice Herbert, by whom this decision was pronounced, though an honest and conscientious man, had the most exalted, or as Burnet put it, "high notions," respecting the king's prerogative, which, being known to James, he appointed him unsolicited Chief-Justice of the King's Bench. This decision, under which James could dispense with the test act that required any one before taking a public office, in addition to other obligations, to abjure all belief in the doctrine of transubstantiation, and which he informed Parliament he intended to do, "struck," in the language of Hume, "universal alarm throughout the nation, infused terror into the church, which had hitherto been the chief supporter of the monarchy, and disgusted the army."[1]

When James in 1687 issued his "Declaration for liberty of conscience," which "annulled all oaths by which subjects were disabled from holding office," and followed it up by removing Protestants in numerous instances and appointing Roman Catholics in their places, it necessarily followed that the decision which authorized this use of his prerogative was throughout the kingdom the subject of constant discussion. It was assailed in sermons, books, and pamphlets, in which the Chief-Justice was held up to general condemnation. To express it in his own words, "he had the hard fortune to fall under the greatest infamy and reproach that it is possible for any man to lie under, of perjury and breach of trust, in giving judgment in Sir Edward Hale's case contrary to law and contrary to my knowledge and opinion, which alone made it criminal."[2]

[1] Howell's State Trials, Vol. II., p. 1260; 5 Col. Doc. p. 103.

[2] A Poetical Essay toward an Epitome of the Gospels, 1678; Letter of Remark upon Dr. Kirk's Jovian, 1683; A Commentary on the Life of Edward VI.; Grotius's Argument on the Truth of Christianity, put in English verse, with an appendix concerning the Prophecies, 1686; A Paraphrase of Waller's poem on Divine Love, 1688.

[3] *Argumentum Antinormanicum*, or an Argument proving from Ancient Histories and Records that William, Duke of Normandy, made no absolute conquest of England by the sword, in the sense of our modern writers, London, 1682.

[1] Hume, chap. 70.

[2] 11 Howell's State Trials, p. 1251.

Being, as appears to have been generally conceded, a conscientious man, Sir Edward felt the weight of this public condemnation, and in 1688, the year of James's abdication, being then Chief Justice of the Common Pleas, to which he had been transferred as not sufficiently compliant at the head of the King's Bench, he published what he called his vindication,[1] in which he set forth the authorities upon which his decision was founded. When the vindication appeared Sir Robert Atkyns, afterwards Chief Baron of the Exchequer, had just completed a work upon the king's power of dispensing with penal statutes, in which he gave an exhaustive account of the origin, nature and limitation of this power, and before publishing the work he added to it, as an appendix, an answer, and a very complete one, to Sir Edward Herbert's Vindication; and Atwood in the same year also published an answer to it.[2]

Atwood's reply was not very well written, and is in this respect in marked contrast with the lawyer-like, well constructed and convincing argument of Sir Robert Atkyns. Sir Robert, in his answer, was especially courteous to the Chief Justice. He refers to the high character he bore and does not assume to question the sincerity of his statement in his "Vindication," that he had decided what he conscientiously believed to be the law. Atwood's course was the very opposite. He begins his book by declaring, in a very involved way, his disbelief in Sir Edward's sincerity. He charges him, in another part of it, with "willful falsification or criminal negligence," and at the end of it says that "unless he is much misinformed, the Chief Justice, notwithstanding his assertion of his innocence, may be justly charged with having procured the judgment by "threats and solicitations"; the book throughout displaying the coarse nature of the man and his low grade as a partisan, characteristics he exhibited more fully in New York, where he became one of the worst judges the colony ever had.

In this tract he reviews the cases on which Sir Edward Herbert relied, but does it in such a way as to leave on the mind of the reader only a confused impression. There are passages so involved and obscure, that it is difficult to discover what he means, and in the midst of his examination of cases, he digresses, that he may refer to "the glorious Expedition of the Prince of Orange," whose marvelous successes, he says, "are not only the subject of present admiration, but have been plainly foretold in past ages"; for which he cites the prophecies of Nostredamus the French astrologer, and the writings of Grebner, another vendor of knowledge of the future derived from the stars.

The work, however, shows that he was well acquainted with the early authorities and statutes. It displays considerable acuteness in discriminating cases and fixing the exact limits of their authority, and establishes satisfactorily that those on which Chief Justice Herbert relied did not warrant the construction he put upon them, which was not difficult to do, for Lord Campbell says that when Sir Edward's selection as Chief Justice of the King's Bench was under consideration, two objections were presented, the first of which was that he was conscientious in his opinions and of strictly honorable principles in private life, and the other that he was quite ignorant of his profession.[1]

After the passage in 1689 of what is known as the first act of settlement, vesting the crown in William and Mary, and declaring that the administration of the government should remain solely in King William, an opportunity was afforded Atwood of

[1] A short account of the authorities in law upon which judgment was given in Sir Edward Hale's case by Sir Edward Herbert, Chief Justice of the Common Pleas, in his own vindication. London, 1688.

[2] The Lord Chief Justice Herbert's Account Examined, wherein it is shown that those authorities in law, whereby he would excuse his judgment in Sir Edward Hale's case, are very unfairly cited and as ill applied. London, 1688.

[1] Lives of the Chief Justices, Vol. 2, p. 80.

writing a book that would naturally attract the attention of the government. The difficulty had been, after the flight of James, to determine what could consistently be done, for it was a maxim of the English law that the crown was never vacant; that upon the death of the sovereign it passed, in accordance with this maxim, at once to his rightful successor, and that if the sovereign became incompetent, the only course was to appoint a regent. This William would not accept, nor would Mary agree that the crown should be settled upon her alone. The provision for a king instead of a regent passed the House of Lords only by a majority of two; that body also refused to agree with the Commons that there was an original contract between the king and the people, which James had broken by attempting to subvert the Constitution, and that as he had abandoned the kingdom, the throne was vacant. They concurred finally in the act of settlement, but only by a small majority, and some who voted for it did so as an act of necessity, because nothing else could be done. Many who disapproved of the acts of James, and did not desire his return, maintained notwithstanding that he was the lawful king, who could not, unless with his own consent, be divested of his inherited right to the crown. The Tory party, which was numerous and powerful, were in open opposition from the beginning of William's administration, and had in its ranks those thereafter known as Jacobites; who were divided into two sections, those who were for the restoration of James, with a general amnesty and guarantees for the security of the civil and ecclesiastical constitution of the realm, and those for his restoration without any conditions, "that he might be free either to spare or to punish traitors, and to dispense with any of the laws that he thought proper, being, if he acted wrongfully, answerable only to heaven and not to the people."[1] The question therefore, notwithstanding the act of settlement, continued to be agitated, whether William was the lawful king, and Atwood, the year after its passage, 1690, published a folio entitled "The Fundamental Constitution of the English Government, proving King William and Queen Mary our lawful King and Queen." Such a publication, at such a time, if it displayed any ability at all in showing by historical research and legal reasoning that William and Mary were the lawful, as well as the acting sovereigns of the nation, could not but be regarded with favor by William and his ministers, and Atwood was not the kind of man to allow the government to remain ignorant of the nature and extent of his labors in support of the Protestant ascendancy. He followed this up in 1694 by a treatise on the antiquity and justice of the oath of abjuration,[1] and in 1698 published a small work on the history and reasons of the dependency of Ireland upon the imperial crown of England. It was, I apprehend, in recognition of these services in support of the government, and not from any eminence he had attained at the bar, that he secured thereafter the appointment of Chief Justice of New York.

Broughton, the Attorney-General, was a barrister of the Middle Temple, of long standing, a well-read lawyer and a man of integrity, moderation and good sense. It is somewhat remarkable that a London barrister in good standing, as Broughton appears to have been, should have been willing to take an office in the Colony, the salary of which was only £100 a year, with fees in the Court of Admiralty that probably amounted to £100 more. But he may have been a man of some means, who was influenced by the attraction of a high judicial office, or

[1] Macaulay's History of England, p. 348.

[1] A subject to which further attention had been drawn by a bill introduced and defeated in the House of Commons, providing that all persons holding any office, civil or ecclesiastical, should take an oath before a justice of the peace, abjuring King James, and if they refused, that they should be committed to prison, and remain there until they complied.

possibly by the prospect, in a new country, of a future for his children, for he writes to the Lords of Trade that he had brought with him "eight in family," and did not know "where to fix them, houses in the city were so scarce and dear, and lodgings worse," ending by asking them to allow him to occupy one of the houses of Capt. Kidd, which had been forfeited to the government.[1]

The two officials arrived in New York after a voyage of ninety days, on the 24th of July, 1701, and although the time was unpropitious, being the hottest period of the year, they were invited to numerous dinners and entertainments; every attention was shown to them, and the corporation conferred upon each of them the freedom of the city.

At this time there were two factions in the Colony, known as the Bayard party and the Leislerians, who, after Lord Bellamont's death, were struggling for supremacy, and in the interval between the death of Bellamont and the appointment of his successor, Lord Cornbury, the Leislerians were in power. They were the party that Lord Bellamont had recognized, and as it was at his request that an English barrister had been appointed to fill the office of Chief Justice, instead of being selected, as before, from the Colony, it was perhaps to be expected that the newly appointed Chief Justice would regard favorably the party that had had the confidence of Bellamont. Atwood, moreover, in virtue of his office, was a member of the Council. As such he had duties connected with the administration of the affairs of the province, as distinguished from those that were judicial, which were discharged in a council composed exclusively of Leislerians, and under such circumstances it was not remarkable that he should be in sympathy with those whom, from the outset, he was brought in official connection. But he went far beyond that. He became the leader of the party, and as such one of the most active, unscrupulous, and vindictive of partisans.

[1] 4 Col. Doc. 914, 253.

Broughton the Attorney-General's course was different. In a very short time he formed a correct judgment of the two factions, "between whom," as he said, "he could not discover any more material ground for their differences, notwithstanding the many allegations on both sides, than a desire to be distinguished," and he wrote to the Lords of Trade suggesting that they should get the King to give Lord Cornbury, who it was understood was to be Lord Bellamont's successor, special instructions "to use temper and moderation upon his first coming"; to treat each party with like favor and respect, by which means, he said, "after he has run some course, in such a management, he will be able clearly to discern who are true friends of his Majesty and his government here, and then it will not be difficult for him to determine how to steer himself for the future,"[1] an advice which, if given, Cornbury never followed.

Atwood, in addition to his office of Chief Justice, was also commissioned as the judge in admiralty, with an extensive jurisdiction embracing the New England colonies, New York, New Jersey and Pennsylvania. Lord Cornbury, in an official communication afterward to the Lords of Trade, stated that Atwood and Thomas Weaver, who was then the collector of the port of New York, were both "persons extremely indigent," that they were "partial, unjust, violent and turbulent," who had "contrived and complotted the ruin of the principal inhabitants, so that their estates, which were considerable, might be forfeited to the government for debts due to it." That Atwood, "in the execution of his office as Chief Justice and as judge in almost all cases that came judicially before him, by the chief report of all present, openly, notoriously and most scandalously and with wonderful partiality, in

[1] 4 Col. Doc. 914.

almost all cases where his son was concerned as counsel, espoused and pleaded and gave countenance to such cause and finally gave judgment on that side" (his son's), "by which means justice was perverted, the law abused and violated, and the subject exceedingly injured, which recommended his son to great practice, and large sums of money were by parties given him to buy his father's favor." [1]

If this account of Atwood had nothing to support it but the statement of a governor, whose own conduct as an official was disreputable, it would be received with distrust; but what we know of Atwood's career in the Colony, from other sources, warrants the belief that it was substantially true. Of information derived from other sources is an account, in an abstract of letters received from New York by the Lords of Trade, of Atwood's conduct upon the trial of one Roger Baker, a lieutenant of a regiment of militia in New York, and the keeper of a tavern where the Anti-Leislerians, or Bayard party, were in the habit of meeting, who was indicted for saying that King William was "a nose of wax," who would be "no longer king than the English please." It described how the jury was packed with Leislerians, or, as the account calls them, "Dutchmen," the last one impaneled, who was an Englishman, being reluctantly taken by the sheriff to fill up the jury. Three witnesses only were examined, the first of whom testified that the words were spoken by Baker, but added that they were all very drunk, it being a holiday. The other two swore that they were present during the whole time, that they heard no such words, nor anything like them; that they were all drunk, and that the witness who testified to the speaking of the words was so drunk as to be unable to "stand." Upon this evidence Atwood charged the jury to bring in a verdict of guilty. The jury retired, and after staying out all night returned in the morning with a verdict of not guilty, at which the account says Atwood was very angry, that he refused to receive the verdict and sent them out again; that after remaining out for six hours they returned and again rendered a verdict of not guilty. At this, the account continues, the Judge "grew very passionate and threatened them; that they were sent out again several times," but persisted in rendering a verdict of not guilty, upon which he threatened to fine and imprison them, which, the account says, "so alarmed the eleven Dutchmen" that, upon Atwood's demanding who among them would not agree to a verdict of guilty, they named the Englishman, when, the account states, "the Judge fell upon him with menacing language," and by "hectoring and threatening him, so managed him" that at last he gave his consent to a verdict of guilty, which being rendered, Atwood fined Baker four hundred pieces of eight, a very large amount at that period, and ordered that he should remain in the custody of the sheriff until it was paid and made such an "acknowledgment as the Lieutenant-Governor should think fit." [1]

Atwood afterwards undertook to obviate the effect of this scandalous proceeding, not by denying anything contained in this account, but by stating that the witness who swore to the speaking of the words was a man of good credit, who all the jury declared they believed would not forswear himself; whereas the Englishman was of such ill fame that a jury of his own party found him *in effect* guilty of forgery, whatever a finding *in effect* may mean, and that he took with him in the jury room a lawbook of no authority, and by a false application of it misled the jury.[2]

When it was ascertained that Lord Cornbury was appointed, the anti-Leislerian party, of whom Col. Nicholas Bayard was the leader,

[1] 4 Col. Doc. 1010, 1011.

[1] 4 Col. Doc. 810, 957 N. Y. Hist. Soc. Col. for 1880, p. 282.

[2] N. Y. Hist. Soc. Col. for 1881, 282.

determined to make an effort to recover their past influence, and Bayard had addresses to the King, the House of Commons, and to Lord Cornbury, subscribed at the tavern of one Hutchins, an alderman of the city, in which the Leislerians, who then had the control of the House of Assembly, of the Council, and the support of Lieutenant-Governor Nanfan, were charged with enriching themselves by the spoils of their neighbors, and stating that the Assembly had bribed the Lieutenant-Governor and the Chief Justice, the former to sign their bills and the latter to defend their legality; which addresses were signed at Hutchins's tavern by a considerable number of the citizens and by many of the soldiers of the garrison, who, it was alleged, were brought there for that purpose. This greatly exasperated the party in power and especially the Lieutenant-Governor and the Chief Justice. A statute had been passed in 1691 by the Assembly, immediately after the Leislerian insurrection, recognizing the right of William and Mary to the sovereignty of the province, at the end of which was a very loose clause, said to have been inserted by Bayard, or through his influence, declaring that any person who should, by *any* manner of ways, endeavor, by force of arms *or otherwise*, to disturb the peace and quiet of their majesties' government as then established, should be esteemed rebels and traitors, and incur the penalties which the laws of England provided for such offenses. Nanfan, — no doubt upon the suggestion of Atwood, who, Smith the historian says, "stimulated the prosecutions that followed"[1] — determined to have the principals in the getting-up of these addresses convicted, under this statute, of high treason, which was drawn up in terms so general that under it an unscrupulous judge might declare that any act or words, intended to be in any way offensive or derogatory to those in power, was in the formal words of this act an endeavor to disturb the peace and quiet of the government, and was therefore, within the meaning of it, high treason.

Nanfan accordingly summoned Hutchins to deliver up to him the addresses that had been signed, which Hutchins refused to do, upon which the Lieutenant-Governor had him committed to jail. This aroused Bayard, and he with three associates, on the following day, addressed a written communication to the Lieutenant-Governor expressing their confidence in the legality of the addresses and asking for the release of Hutchins. Nanfan sent their communication to the Attorney-General Broughton for his opinion of it as well as of the addresses and of Hutchins' refusal to give them up, and Broughton returned a written opinion to the effect that there was nothing criminal in the addresses, and that the refusal to give them up was not such a contempt as authorized the commitment of Hutchins. This opinion on the part of the prosecuting officer of the Crown was a serious obstacle; but Atwood was equal to the emergency. He and Thomas Weaver, the collector of the port, who was also a member of the Council, succeeded, and, as I infer, with the aid of the sheriff, who was of the Leislerian party, in getting a grand jury together, who found a bill of indictment against Broughton for neglect of duty; that is, for not prosecuting men for an act of high treason, when he had declared in an official communication that the act complained of was not a criminal offense; and Nanfan followed up this indictment by suspending Broughton from his office, whom he could not remove, as he held his appointment from the Crown, and wrote to the government asking for his removal, a request with which it did not comply.

The Council then issued a warrant for the arrest of Bayard and Hutchins for high treason, signed by Atwood, Weaver and two other members of that body, upon which Bayard and Hutchins were committed to jail and a file of soldiers was placed as a guard

[1] 1 Smith History of N. Y., p. 165.

over the prison, to prevent a rescue. This being done, Nanfan issued a commission for a Court of Oyer and Terminer, to be held by the Chief Justice and two of the puisne judges of the Supreme Court, Abraham De Peyster and Robert Walters, who were of the Leislerian party, for the trial of the prisoners, and he appointed Weaver Solicitor-General to conduct the prosecution, an office before unknown in the province.

The accused petitioned that they might not be brought to trial until the regular sitting of the Supreme Court, as they wanted the intervening time to get ready for their defense. The request was denied, and only five days were allowed Bayard to prepare for his trial, which was the first, the intention evidently being to have him tried and convicted as quickly as possible, as it was not known when Lord Cornbury might arrive, and it was by no means certain what view he might take of the proceeding.

It was doubtful if a grand jury could be got that would find a bill of indictment against Bayard, for an offense the punishment of which was death. The Leislerians were chiefly composed of the Dutch and Huguenot part of the population, and Bayard, in addition to being personally popular, was a Dutchman by birth and the son of a Huguenot. Weaver, foreseeing that there might be difficulty, went himself with the proofs before the grand jury, and gave orders that no one should be sent for to appear before them except such as he might name, nor any question asked except such as he should approve. Four of the jurors objected to the presence of the Counsel for the Crown during their deliberations. They also claimed the right to send for any persons and to ask any questions they thought proper, and the reply made by Weaver shows the despotic arrogance of officials in that day. It was that he would have these four jurors "trounced." He took down their names, and Atwood ordered them to be discharged and four others put in their place. But notwithstanding this, and although Atwood charged them that the facts which the prosecuting officer of the Crown would lay before them amounted to high treason on the part of Bayard, the jury, after long deliberation, hesitated and adjourned at a late hour on Saturday night until Monday morning, without finding a bill of indictment against him. This incensed Atwood, who declared that if the grand jury did not find a bill, he would have an information lodged against Bayard for high treason and try him in that way.

On the following Monday the grand jury came into court, and the foreman, who was the brother of one of the puisne judges, De Peyster, handed up the indictment endorsed and signed by him as a true bill, which Atwood immediately took, and *at once* discharged the grand jury. Nicholls and Emot, the defendant's counsel, then informed the court that eight of the nineteen grand jurors were against finding the bill of indictment; and that as the concurrence of twelve at least was necessary to the finding of a true bill, the foreman had no right to present it, and they moved that those of the jury who were present might be examined as to the fact, and the remainder sent for. Weaver's answer to the motion was in the partisan spirit of the period. "When you had the government, Dr. Staats had a bill filed against him by eight out of eleven," which Nicholls did not admit. But Atwood was more adroit. He knew that the concurrence of twelve jurors was essential to an indictment, and denied the motion upon the ground that the jury had been discharged, and that there was no longer any grand jury.

Nicholls then moved to quash the indictment, offering to produce a written statement by eight of the jurors that they had not given their consent to the bill, which Atwood met by the subterfuge that the indictment had then become a matter of record, and that no averment could be re-

ceived to impeach a record, and knowing this to be untenable, declared he would hear no further argument, and ordered the trial to proceed. Bayard's counsel then asked for an adjournment until the following Monday, to which Atwood answered: "No. We will not give Mr. Vesey" (who was then the pastor of Trinity Church) "the opportunity of another sermon against us." And as the trial was about to proceed an incident took place showing the character of the man who was presiding over it. Perceiving that Jameson, a lawyer who was present, was about to take notes, Atwood forbid him to do so. Jameson said he was exercising the right that every attorney had to take notes of a trial for his own private use. Atwood: "You are no longer, sir, an attorney of this court, nor shall you practice until you have purged yourself for signing the addresses. Put up your pen and ink." With difficulty an adjournment was obtained for a day, and on the adjourned day Bayard presented a written statement that the indictment was not found by twelve grand jurors; that the foreman had no power to hand in the one endorsed by him as a true bill; that it had not been agreed to by twelve of the jurors; that there was not one Englishman on the grand jury when the bill was presented, but that they were all of Dutch extraction, many of whom could neither read, write, nor even understand the English language; to which Atwood's answer was, "Let it be entered that it appears to the court that the bill was found by more than twelve jurors."

When the trial was brought on, the proof against Bayard was that his name was signed to one of the addresses, and that he and his son were present at the tavern when they were signed by soldiers and others. The addresses were not put in evidence, but some loose testimony as to their contents was given, which Atwood held was sufficient to show their treasonable character, stress being laid upon the failure of Bayard, in whose possession or under whose control they were assumed to be, to produce them.

Nicholls, in a very able argument, maintained, citing many authorities, that it was no crime to petition the king and the House of Commons. "I don't say," said Atwood, "that it is a crime to petition the king, but it is to petition the House of Commons, in the plantations, for there the king governs by his prerogative, and with the government there the House of Commons have nothing to do." Nicholls replied that it was an every-day practice. He argued that it was not only an ancient right, but was expressly given by an act passed in the reign of Charles II., and that an act in the reign of William and Mary declared that all prosecutions for exercising it were illegal. He quoted the remark of an English judge that to petition is an Englishman's birthright, and especially insisted that the right to petition the governor of a province was apparent, as he was made amenable by statute for any miscarriage of his government that was brought to the attention of the crown.

The ground taken by Atwood that the House of Commons had nothing to do with the government of the colony, and that in New York it was a crime to address a petition to it, as the king alone governed in the colony, involved the anomaly that although an English subject, while in England, had guaranteed to him, both by ancient usage and by acts of Parliament, the right to petition the House of Commons; yet if he became a resident of the British colony of New York, he could be indicted for high treason if he dared to exercise it.

From Atwood's point of view the crime against the king was in appealing to another branch of the government, when the power to rule the colony was vested solely and absolutely in the king under his prerogative. Blackstone says that, in the reign of James I., the unreasonable exercise of what was deemed the king's prerogative — the claim

of more absolute power than had ever before been carried into practice — awakened the sleeping lion, and that when his successor, Charles I., strained the prerogative beyond the example of former ages, the popular leaders overturned the monarchy.[1] The nature and extent of the king's prerogative in a colony like that of New York, which had been acquired by conquest, is a subject the exposition of which would occupy too much space in an article like the present. It is one that I have examined very fully, and in respect to which I am able to state that Atwood's claim that the king, by virtue of it, had the sole, exclusive, and absolute power of governing in the colony, was without foundation.

[1] 4 Black. Com., Book IV., c. 33.

OLD WORLD TRIALS.

IX.

REGINA *v.* BELLINGHAM.

OF all the criminal trials of the present century there is none of which English lawyers have such good cause to be ashamed as that which forms the subject of the present paper. On 11th May, 1812, the Rt. Hon. Spencer Perceval, second son of the Earl of Egmont, and then first Lord of the Treasury, was shot, while entering the lobby of the House of Commons, by a man who had been watching for him near the door, named John Bellingham. The bullet entered Mr. Perceval's left breast, and he died almost immediately. Bellingham made no attempt to escape, and confessed his crime. Practically the only question at issue was as to his sanity. The Prince Regent, afterwards George IV., appointed a special commission to try him, and *four days after the murder*, viz., on 15th May, he was brought before this tribunal, of which Sir James Mansfield was president. The prisoner, we are told, was brought in "heavily ironed on each leg, and advanced firmly up to the front of the bar, where he bowed respectfully to the court. He was dressed in a shabby brown duffle great-coat, buttoned close up to his chin so as to render his neckcloth, which was dirty, scarcely perceptible. He placed his hands upon the bar, and stooped forward as if to listen with great attention to what was passing." On being asked to plead to the indictment, he declared himself not ready to go to the trial, as the documents necessary for his defense had been taken from him. He was directed simply to plead guilty or not guilty. He put in the latter plea. Then his counsel, a Mr. Alley, moved the court to postpone the trial, as there had not been time to communicate with the prisoner's friends who could prove his insanity, and supported his motion by two affidavits by relations of Bellingham's, stating that his insanity was notorious to every one who knew him. The court refused the motion in its indecent haste to proceed to judgment. Then the case was opened by the Attorney-General. The facts, as he stated them, were these: Bellingham had gone to Russia some years before, for a mercantile house in Liverpool, and had been imprisoned at Archangel on a charge of having given information concerning the loss of a ship to Lloyd's coffee-house. After his release Bellingham appealed to Lord Leveson Gower, the British ambassador in St. Petersburg, for redress, but nothing was done. He then returned to Liverpool, and set up in business on his own account. But

his experience weighed upon his mind, and he endeavored to get the British government to take up his case. No one would bring it before Parliament. He then applied to Mr. Perceval, but the Prime Minister declined to interfere. Bellingham then provided himself with pistols, balls, and powder, waylaid Mr. Perceval in the lobby of the House of Commons, and shot him, as we have already stated, fatally in the side. It is a curious circumstance, by the way, that Mr. Perceval was warned by a friend not to go to the House of Commons on the day of the murder, as he had dreamed that he saw the Prime Minister shot by a man wearing a suit of clothes such as Bellingham was proved to have worn on the day. Like Cæsar in the well-known story of Calpurnia's dream, Perceval disregarded his friend's advice, and went forth to meet his Ides of March. Called upon for his defense, Bellingham commenced by thanking the Attorney-General for having brushed aside the plea of insanity which his counsel had set up on his behalf. He then gave an account of the oppressive treatment he had received in Russia, and appealed to the jury as men, as fathers, and as Christians, what would have been their sensations had they been so imprisoned, while his wife who was then pregnant, and his child were compelled to proceed to England from Russia without a friend or protector. He then, after the manner of such persons, read to the jury the mass of petitions which he had forwarded to all classes of public persons, and their replies to his appeals, fiercely denounced Lord Leveson Gower, who was sitting facing him in the court, and concluded his defence by expressing the hope that the serious lesson which he had given would be a warning to all future ministers, and invited the jury to send him back in comfort and honor to his family.

His counsel took up the tale, and three witnesses were produced, who declared Bellingham to be insane; one of them, Mrs. Anne Billet, deposed that the father of the prisoner died mad, and that ever since his return from Russia, he had been considered insane on the subject by all his friends. On one occasion he had taken her and his own wife to the Secretary of State's office to convince them that he should get £100,000 from the government. When he arrived, he was told positively he could get nothing, and yet, when he got into the street, he appealed to his wife as to whether his assertion had not been confirmed, and stated that he would buy a property in the west of England and a house in London with the money.

In charging the jury, Sir James Mansfield laid down what is known as the "right and wrong in the abstract" theory of criminal responsibility. About a century before, in Arnold's case, Mr. Justice Tracy had declared that only a lunatic who had no more intellect than an infant, a brute, or a wild beast was irresponsible. Hadfield's case, however, had disposed of this theory forever, and now Sir James Mansfield told the jury that the question of an insane person's responsibility depended on whether he did or did not know the difference between right and wrong.

After a quarter of an hour's absence the jury returned a verdict of guilty, and Bellingham's trial, which had commenced at ten in the morning, ended at six in the evening in his being sentenced to death. He was executed seven days later.

The whole episode was profoundly disgraceful to the government, to the court which tried Bellingham, and to the public who clamored for his death.

Little more than thirty years afterwards the legal test of responsibility in mental disease was again altered and made to depend on whether the prisoner knew the nature and quality of the particular act with which he was charged at the time of committing it; and here the law of England still nominally stands. But "the rules in MacNaugh-

ton's case," as they are called, in which this test is embodied, are now manipulated by most judges so as to protect the lunatic, who, while knowing that an act is wrong, is prevented by disease of the mind from restraining himself from doing it. LEX.

ROMAN LAW AND CONTEMPORARY REVELATION.

By Rev. George F. Magoun.

AN observant and learned Massachusetts judge, not long since deceased, once said to a friend of the writer, that "in the Roman law there is a mine of interpretation of the writings of the Apostle Paul, all unworked." Now and then a cyclopaedia says the same thing. A fresh and suggestive writer suggests in the "Contemporary Review" for August, 1891, that more satisfactory comments on the writings referred to will be produced when scholars are, "in addition to other qualifications, thorough masters of the history of civil jurisprudence," and that what seems darkness in him more than in other writers is "due chiefly to our ignorance of the intellectual atmosphere in which he lived."

The phrase "illiterate fishermen" is true enough of some of the New Testament writers to make it certain that they will yield no trace of the literature or law of the two great classical races of antiquity. Matthew, Mark, James, Peter, and Jude show none, nor that superior genius, John, nor the physician Luke. And of the recognized letters of Paul only those to persons residing in Rome, in Ephesus, and in the country named from some early European settlers, Galatia, who alone could understand them as Jews could not. And here we find unused the complex details and niceties of Roman law which support no analogies to Christian teachings, which were therefore useless for his purpose. He employs only certain great peculiarities which furnished a "mould" or "costume" for his thoughts not to be found anywhere else.

On the side of the law too, which, from his citizenship and his profession, the Scripture writer who was born neither in Palestine nor in Rome, but in a district of the Greek Asia lying between, knew well, we meet with limitations. It is an interesting circumstance that while the Justinian modifications of the classical law of the republic were due largely to Christianity, the figures of speech and phraseology of the later Scriptures were influenced by the pristine law of the republican and regal periods of Rome.

These considerations should have prevented the assertion some years since in a New England review, by a Colorado writer, that the idea of the sovereignty or kingship of the divine being was introduced into religious doctrine by John Calvin, who had studied Roman law before his preparation for the priesthood. As this idea, according to any chronology, is some centuries older than the time of Calvin or even that of Romulus and Remus, and as all English Bibles contain the eighth chapter of the book of Samuel with its account of the revolt of the Jews, long before either, against theocratic rule, and their demand for a human king resulting in the reign of Saul, respect for chronology should have forestalled this blunder. Not less glaring is the clerical mistake which now and then traces to the Roman legislation the theology of atonement for human sin which prevails in the earlier Scriptures and especially in Leviticus. Our judgment of the real influence upon an Apostle of Christ long after, of the jurisprudence of the empire in which he inherited citizenship, must be disencumbered as to such an influence where it was historically impossible, and

where the tenets he taught, whatever they were, and whatever their truth or error, were connected in his mind with the ancient documents of his faith as a Jew. It is clear enough that the first title of the Justinian Code on the Trinity came from the Christian religion a few centuries older than itself; but it is far from clear that we should place articles of religion common to both Old Testament and New under the rubric or category of a secular institution so many centuries younger than they are.

This point can be exemplified in minor particulars. As we are precluded from finding any hidden or formative allusion to Roman law in an epistle addressed to those ignorant of this law, on whom it would therefore shed no light, so we are not at liberty to find one where a usage referred to was common to all the ancient world. It was to the Romans, indeed, that Paul illustrated freedom from former religious law by Christ, taking marriage as the secular analogue. The wife is bound while her husband liveth; but free or discharged by his death, "so that she is no adulteress, though she be joined to another man." So the soul, dead to the law, may be "joined to another." (Ep. Rom. vii. 1–6.) But in what society—where marriage ever existed—was not this true, and with what adherents of the religion he taught could he not have used the facts by way of illustration?

Ever since men have exercised the right of private property they have had heirs, for one's property must go to some one else on his death; forms of thought and language, then, which are simply in keeping with common Oriental life, are to be interpreted thereby. Examples of this are given in to inherit, heirs, inheritance. In ancient Israel, Eleazar, born in Abraham's house, whether as relative or as servant, and called by him "son of his house," or "son of possession" is a case of ordinary Oriental heirship, with no touch of Roman relations about it, as its occurrence so long before the Twelve Tables shows. So joint heirship of Jews and Gentiles (Eph. iii. 6, Hebr. xi. 9, 1 Pet. iii. 7) cannot be taken out of the ordinary association of inheriting in common. Sound interpretation and scholarly insight require nothing more. If men alone are meant, or men as representative, including women, there was nothing beyond what Asiatic birth and training suggested. These must be traversed in order to refer facts of inheritance under the Pauline proposition, "no male and female, for ye all are one man in Christ Jesus" (Gal. iii. 28), to the Roman law.

It is difficult to accept the surmise of the able writer in the "Contemporary Review," that a reference to the well-known custom of gathering a patrician's freed slaves at the funeral of their emancipator is hidden in Ephesians i. 12–14. If there is one, it seems very deeply and deftly hidden, and quite superfluous. The words are in the revised version: "to the end that we should be unto the praise of His glory, we who had before hope in Christ; in whom ye also, having heard the word of the truth . . . were sealed with the Holy Spirit of promise, which is an earnest of our inheritance, unto the redemption of *God's* own possession unto the praise of His glory." Certainly what here and elsewhere is meant by "redemption" is made to accrue to the glory of God; but one would never think of a group of freedmen at a Latin funeral unless it were ingeniously and elaborately suggested.

In this language has also been imagined an allusion to the Pretorian will, the first instrument ever sealed "as a mode of authentification in the history of jurisprudence." (Maine, "Ancient Law.") In itself such an allusion is far from incredible, as the Romans were wont to enter Asia at Ephesus, and that city became the emporium of a great trade between the western part of the empire and the eastern, and the proconsular capital of the "Asia" of the New Testament.

Through the imperial officer known as *praetor peregrinus* this form of will was there made familiar, as elsewhere outside of the imperial city. Paul's extended residence must have made Ephesians familiar with his style of expression, so if he had needed such an allusion it would have been clear to them. But sealing was common everywhere, aside from the Pretorian will (Maine, p. 264) — private seals, employed instead of signatures, were universal, — and this instrument, with all the validity acquired by successive edicts, did not pass absolute rights of inheritance, such as Paul in spiritual things was wont to assert. The dignity of an allusion to the Pretorian will here — if one there can be, the seal being the only common element — is unquestionable. It was one of those liberalizations of earlier law, which accompanied the extension of citizenship through the empire. Others went along with it which eventually affected the society and the civilization of our modern world. But this was itself only an alternate form of will, and for long little used, the *testamentum per aes et libram* still continuing even later than the empire. So good a scholar as Endicott observes, *in loco*, that "Any purely objective meaning in reference to heathen, or even Jewish customs, seems very doubtful."

Still more doubtful, it seems to me, is any reminiscence of Roman law in Hebrews vii. 22, "by so much also hath Jesus become the surety of a better covenant" (*Ac. Version* "testament"). One can agree readily to the observation that the Pauline figures of speech are logical and legal, not poetical and ornamental, and even see how an habitual recollection of the *familiae emptor* would have been easy here, if he had coupled or made adjacent the thought of the redemptive "purchase" of the church, such as appears in his address at Miletus. (Acts, xx. 17–28. Cf. Clark, "Regal Period," 118.) The purchaser of the *familia*, that is of all the rights, privileges, duties, and obligations existing in and through the family, including property and slaves, is indeed the central and most interesting personage in the ancient mancipation, which, along with the ancient plebeian will, connects the infancy of society with its riper ages. But with other antique formalities described by Gaius in his "Commentaries" (II. § 104), this in time lapsed, and became "a mere figure-head," says Prof. Hadley, and a century before Justinian had been given up. Yet in Paul's day, a century before Gaius, it must still have had a known meaning, which, if he wrote to the Hebrews, he might have employed as significant but for their ignorance as a people of the classical mancipation, *familiae emptor* and all.

This suggests a question more deeply vexed: Does the written will appear anywhere in the text of Paul? The Hebrews were not a will-making people. Yet it is in this same epistle to the Hebrews that the writer — whoever he was — has in mind that of which his readers knew nothing, however familiar he was with it, being purely Roman. (Ep. Heb. ix. 15–20. A. V.) "When the Romans are best known to us," says Hadley, "they were eminently a will-making people . . . If a will was not executed with the precise formalities prescribed, it had by the law of the Twelve Tables no validity whatever." Not only were these formalities, but the will itself — at first unwritten, declared orally in the *comitia curiata*, then placed on waxen tablets with seals of seven witnesses attached — was a purely Roman invention. Mr. Maine doubts if the power to make one was originally known to any other people. "No evil," he says, "seems to have been considered a heavier visitation than the forfeiture of testamentary privileges; no curse appears to have been bitterer than that which imprecated on an

enemy that he might die without a will." All this is not only distinctly non-Hebrew usage; it is anti-Hebrew.[1] Judea "was never Romanized, never colonized by Roman citizens, or subjected to Roman law." ("Cont. Review.") They who regard the ninth of Hebrews as written by Paul have no ground, then, for even imagining that he framed it on the lines of what Phillemore calls "an eminently artificial chapter of human legislation" ("Private Law among the Romans.") Much less those who ascribe this scripture to some converted Jew, a follower of Paul, unversed in foreign institutions. There was, to be sure, a Rabbinical will, a copy of the Roman, unknown before the conquest of Palestine, and, were this an epistle to Rabbis of that later date, their form of will might have been meant and, by them, understood. (Cf. "Cont. Rev." and Jahn, "Bibl. Antiq." 168.) It was, indeed, used only in exceptional cases, and was strange to ordinary Jewish converts, — quite as much so as that which was once only a patrician privilege, with few legatees, was to Roman plebeians. More strange still to such converts was the latter, offering no probable metaphor for a general comparison of the Old Testament regimen and that of the New. The Scripture language: "For where a testament is, there must of necessity be the death of him that made it," is, moreover, loaded with the added difficulty — as given in both English versions — of implying that death came to Him who made the first one of old; but this was God! But more than a recognition of this would carry us too far. Only if the will of Roman law and usage is not meant in Hebrews ix. 15, 16, it is not meant in any writing of Paul whatever.

It may be asked here: why do we still perplex the unlearned by calling the two Biblical volumes, "Old and New Testaments"? The misnomer came down to us, it is true, from so early times as those of Tertullian and Chrysostom. (Smith, "Bible Dict.") Even in New England pulpits, in childhood, we heard the Gospel spoken of as a documentary bequest of our Lord and Saviour at His death! What could the sacred "Testaments" have signified in England when there were but "four examples of wills in existence" in that country? And this was true "down to the middle of the tenth century." (Henry Cabot Lodge, "Essays in Anglo Saxon Law.")[1]

The word διαθήκη, employed thirty-three times in the New Testament, may have the meaning of the Latin *testamentum* where no better can be found; but in thirty-one instances English translators find better ones.[2] Indeed, just before the two verses in which they employ "testament," it is translated by "covenant," and in the very next verse thereafter, the subject matter remaining the same. (Hebr. ix. 16, 17; cf. with 15 and 18.) Why this sudden change? Simply because the "blood" and "death" of Christ have just been referred to; but the old word "dispensation," thereby ratified or made sure, answers better than "testament" or even "covenant," reasons for which cannot here be given, save that it does not imply that the parties in relation stand on an equal footing, as "covenant" does. And did a Roman will ever require a "mediator" or a "surety"? Would one of the late revisers ever think of our lord as the "mediator of a better" will? We shall entangle ourselves in theological exposition if we go farther in this direction. But it is legitimate to say that, in reading the idea of Roman will-making into the text under consideration, that is implied which is not true of it, viz. that the testator

Tacitus, about Paul's time, observed that there were no wills among the German tribes. "The barbarians were confessedly strangers to any such conception." (Maine, Ancient Law.)

[1] The tradition is that St. Austin preached at Canterbury four centuries before this, A.D. 596.

[2] I.e. the Revises.

always died, which Mr. Maine shows might or might not be the case. The mancipation, derived from the more ancient *mancipium*, did not vest a testator's estate conditionally on his death, as "not a few civilians" imagined, or "grant it from a time uncertain, i.e. the death of the grantor." This compels us to look for sound interpretation in another direction, to Hebrew antiquity, and not to Latin.

Our inquiry has led us into the bounded border land between two professions and two great domains of truth. To pursue it farther would carry us across the line into the rich fields of interpretation of contemporary written revelation. We pause in an alluring inquiry; for we have written for well-read lawyers and laymen, and not for Biblical scholars.

A LEGAL INCIDENT.

IS A DEMURRER A PERSONAL AFFRONT? CONFLICTING OPINIONS.

By Camm Patteson.

MANY years ago a young man noted for industry and probity of character, who was six feet seven inches tall and large in proportion, who resided in an inland county in Virginia, and whose education was somewhat defective, determined to study law. He got three books, the chief one of which was "Stephen on Pleading," and after reading them two months without any instructor, applied for and obtained by some unaccountable means a license. He had hardly opened his office before a merchant gave him six accounts upon which he was directed to bring suit. He had no forms except those set forth in an old edition of "Stephen on Pleading," which had been obsolete for more than half a century; he had never seen a Declaration in his life, but he brought the suits. When the cases were called, six of the most enormous documents ever seen in any court-house were placed on the bar of the court; they were not folded in legal style, but were in six tremendous envelopes, addressed to the court, just as though they had been letters. They all commenced as follows: "Charles Creditor complains of David Debtor, who is in the custody of the marshal of the Marshalsea," and so on. Such Declarations were never before seen in America. The counsel for the defendant was an old county court lawyer, not overburdened himself with legal knowledge, but he knew enough to know that these Declarations were demurrable. When the first case was called he rose from his seat in the bar with some difficulty, as he was just recovering from a spell of illness, and said: "May it please the court: I tender a demurrer to the Declaration, and ask the court to pass upon it. In a practice extending over forty years I have never before seen such a Declaration." And he held up the awful looking document, the sight of which caused a suppressed smile on the part of the audience. Now this giant young lawyer lived near the old one. There was an intense rivalry between them, and the manner of the elder member of the bar was far from being pleasant or reassuring. The young man had never heard of a demurrer in his life, and he had not the faintest idea of what it was. In his distress he turned to the writer and asked him what to do. I promptly informed him that he should ask the court to give until the next morning to prepare his defense to the demurrer, which request the court granted. After the court had ad-

journed, the young man asked the writer if a demurrer could be considered a personal affront, and if so he well knew what course to follow. The humor of the situation immediately seized upon and impressed the writer, and he invited the young man to his office and informed him that a demurrer was a very distressing incident in legal proceedings; that it admitted all of the allegations of the plaintiff, but at the same time stated that they were so chaffy, so light, and of such little weight, that they entitled the defendant to a judgment for costs; that in the Colonial days of Virginia there was a well settled tradition that demurrers were considered personal affronts, and that it might be the case now, but I rather thought not; but I would advise him to consult an old and eminent member of the bar, since that time one of the governors of Virginia, and he could safely follow his advice. That counsel caught on to the joke and reaffirmed my advice. When the court opened next morning there was profound silence, when the young man straightened up to his full and enormous height, and in a stentorian but musical voice commenced as follows: —

"May it please the court: I am a young man without experience in my chosen profession, and with but little legal learning. It may be that the statement of the cause of action in this case is inartificial and improper, but I rely on the great Virginia statute of Jeoffails, which is the palladium of the legal rights of the Virginia citizen. That noble statute says, if the case, however badly stated, shows enough for the court to arrive at the true merits of the cause, it is sufficient. Sir, I rely on that noble and commanding statute, made, I am sure, for such cases as this, and to prevent injustice. As to the demurrer, I hurl back the insinuation contained in it that I have stated my cause of action so badly that, admit all I have stated, there is no ground for the action, with scorn and contempt, and if need be with defiance. Sir, I rely on this court to carry out the great principles of eternal justice, and I hope it will rise equal to the occasion. I do not care so much myself, sir, about the infernal demurrer, but the idea that the miserable attorney from the county of —— should attempt to bring into disrepute the honored name and the memory of the great Sir Henry John Stephen, and to strike at him through me, is more than I can bear."

"What do you mean, sir?" yelled the old attorney. "I will hold you to personal account. You talk, sir, about a demurrer being a personal affront; if I only had my usual wind, I would give you a foretaste of what you will often catch at this bar." At this stage of the proceedings a personal altercation was with difficulty averted. The roar of laughter was universal; even the dignified old judge could not repress a smile. He gave me quite a lecture privately for being the cause of such a scene. The demurrer was sustained; the young giant went West, attained a high eminence in his profession, and made a fortune.

SOCRATES AS A CROSS-EXAMINER.

By O. F. Hershey.

THE trial of Socrates, in which a poet, a politician, and a rhetorician appeared for the prosecution, and a philosopher for the defense, can hardly be expected to offer many suggestions to the legal profession. And yet there are few historic trials from which lawyers can learn more. Socrates' defense of himself, as we gather it from Plato and Xenophon, is certainly one of the finest specimens we have of forensic oratory. No trial lawyer of to-day, aided by the examples and experiences of over twenty centuries, could hope to improve upon it. It is easily as eloquent as Demosthenes, and as ingenious as Cicero. The arrangement of his plea is perfect. All the facts and arguments are masterfully marshaled, and every doubt and prejudice of the court is carefully anticipated and allayed. The bit of cross-examination he indulged in repays study; and some of our modern forensic bullies might do well to compare their methods with that of Socrates. One trembles at the thought of what Sir Edward Clarke or Sir Charles Russell, for instance, would do in these days with a witness like Miletus; and compared with their methods, Socrates certainly had cross-examination down to a fine art.

That his defense was unsuccessful was certainly not the fault of the lawyer who conducted it, though it may have been due to the fact that he had a fool for a client. Indeed, it was Socrates' great boast that his superior wisdom consisted in recognizing himself to be a fool, while all his neighbors foolishly imagined themselves wise; and he admits that he was kept so busy going about, telling people what ineffable fools they therefore were, that he had no time for his own business. Under the circumstances one can forgive the court for failing to appreciate his magnificent defense.

There were two counts in the indictment against Socrates. The first charging him with not worshiping the gods of the Athenians, and introducing instead strange divinities of his own; the second with corrupting the youth. The penalty was death.

This was the substance of the indictment presented by Miletus, and hung in front of the office of the ἄρχων βασιλεύς, before whom both the charge and the plea were sworn to. The prosecution was conducted by Miletus, Antynus, and Lycon — the three witnesses on the back of the indictment. The former was an insignificant young tragic poet who opened and conducted the case for the state, and represented the technical charge or indictment proper. Of the two latter Antynus alone was of any consequence. He was a rich radical who hated Socrates probably for mere personal reasons, but made his attack under cover of defending the democracy; and throughout the defense he is treated with sublime disdain.

The Heliastic court before whom the trial took place consisted of probably over five hundred judges; and in addition there was a large audience of Athenians. Socrates, after the manner of Demosthenes in his oration on the Crown, introduces the technical part of the defense in the middle and most obscure part of his speech, and leads up to it by a shrewd attempt to allay the popular prejudice against him as a reputed philosopher and sophist, and to win over the court to some appreciation of the motives that have animated his whole life. Coming to the indictment proper, he determines to slur it over by putting Miletus, its framer, upon

the stand, and by doing so gives the "men of Athens" one of their rarest treats. This man Miletus, Socrates tells them, must be simply jesting, or if not, he must have a low opinion of the intelligence of this court. "He never took the least interest in the things of which I am accused, and I 'll prove it to you. First as to the corrupting youth: —

"Come now, Miletus, tell me, do you not consider it of the greatest importance that the youth should be made as virtuous as possible?"

Miletus says that of course he does; but when asked who makes them any better than they are, he hesitates for an answer, and Socrates nodding to the court, says: "You see how much interest he takes in this matter." Finally Miletus replies that the laws make youths better, at which Socrates smiles and asks for a more specific answer. An inspiration here strikes the witness, and he says the judges make them better.

"Very good," says Socrates, "do you include all the judges?" Miletus is so tickled with his answer that he readily admits that all the judges, senators, hearers, indeed all the Athenians make youth better, excepting only Socrates.

"That 's rough on me. But tell me, Miletus, is it the same with horses? (You know more about them than you do about the virtues of youth.) Suppose that all your neighbors trained your horse, of course they would better him, and only your special trainer could harm him?" Socrates puts him through a little of this, and passes on to the next point.

"Now, Miletus, my good man, tell this honorable court whether it is better to dwell with good or bad citizens? And whether bad citizens do not work evil to those near them?"

Miletus admits that they do, and also acknowledges that no one cares to injure himself designedly. He is then led by skillful cross-questioning to accuse Socrates of corrupting youth designedly.

"So you think I have reached that pitch of ignorance," says Socrates, "that I do not know that if I make any one of my associates depraved, I shall thus endanger myself; and yet you say I designedly bring this great evil upon myself." He then goes on to point out how obviously absurd it is to say that he designedly injures himself, so that if he does corrupt youth, he must be doing it undesignedly, for which he can only be admonished and not punished. Miletus is so obviously done up that Socrates does not spoil the effect by any remarks, but takes up at once to the next count.

"Tell us, Miletus, according to the indictment you have preferred, do you mean to say that I corrupt youth by teaching them not to believe in the gods in whom the city believes, but in other strange deities?"

Miletus answers that he certainly does say so, and in reply to some clever questioning is led to say that by his indictment he means to accuse Socrates of not believing in any gods at all, and of teaching others that there are, in fact, no gods. And he even denies that Socrates believes the sun and moon to be gods, but accuses him of saying that the sun is a stone, and the moon an earth. Socrates easily overcomes this:

"As to the sun and moon not being gods, you fancy that you are accusing Anaxagoros, my dear Miletus, and thus you put a slight on these honorable judges and these assembled Athenians, for you imply that they are so illiterate as not to know that the writings of Anaxagoras of Clazomene are full of such assertions. And the youth moreover learn these things at the play and not from me."

Miletus is led to repeat his charge that Socrates believes in no god whatever, and is then twitted with having instituted the whole proceeding for his own amusement or out of pure insolence and wantonness; and again

with presuming on the inadvertence or obtuseness of the court. After getting the poor fellow all worked up Socrates asks him whether he believes that there are human affairs without human beings; or pipers without pipes; or things pertaining to horses without horses. Miletus is silent.

"But answer to this at least, my good man, is there anyone who believes that there are things relating to demons, but does not believe that there are demons?"

The court here compels Miletus to answer, and he says that naturally there are not. Socrates then picks up a copy of the indictment and reads: "Socrates does not believe in those Gods in whom the city believes, but in other strange gods," and then adds in a tone that must have cut to the core: —

"Therefore, Miletus, according to your own indictment I do believe in demons (*το δαίμονιον*) or in things relating thereto. If then I believe in things relating to demons, there is surely an absolute necessity that I should believe that there are demons. Is it not so? It is. (For I suppose you assent since you do not answer.) But with respect to demons, do we not allow that they are the children of gods? You admit this, do you not?"

Miletus says that he certainly does. "That'll do, Miletus," says Socrates; "step down. You must have preferred this indictment for want of some real charge to bring against me. For how could any man of sense suppose me to believe that there are children of gods and not believe in the gods themselves? It would be just as absurd for one to believe that mules are the offspring of horses and asses and then deny that there are such things as horses and asses."

Later on he asks Miletus why, if he corrupted the youth, their relations didn't testify against him, and that is probably the only really serious question he put to Miletus in his whole defense. The cross-examination is the very essence of irony and contempt. And how skillfully he suppresses and still discloses his contempt — ever remembering that some of the jury are probably no better than the witness and therefore sure to resent his abuse. Without intimidation he prevents the witness from defending himself, and without bullying he gets him to make the most conflicting statements and admissions. Surely Socrates as a cross-examiner is worthy of imitation.

The Lawyer's Easy Chair.

. Current Topics, . . Notes of Cases, etc.

BY IRVING BROWNE.

CURRENT TOPICS.

THE DUTY OF BIOGRAPHERS. — The New York "Tribune," in speaking of the sketch of Charles O'Conor recently published in this magazine, says: "It is unpleasant reading, as opening up the disagreeable contests which form the part of Mr. O'Conor's history which members of the bar are most unwilling to remember." This would be a fair criticism if it were any part of a biographer's duty to furnish pleasant reading regardless of truth. It is our understanding that this is not the duty of a biographer, but that his proper office is to tell the truth without regard to its unpleasantness. The writer seems to labor under another delusion, namely, that it is no proper part of a biographer's office to remind any of the acquaintances of the subject of the biography of anything which they do not like to remember about him. The view of biography thus taken by this newspaper writer would deprive biography of all value except as a sort of cosmetic art toward the subject, and a soothing syrup for his friends and acquaintances. This would do well enough for a bar meeting held over the deceased, although even there it is less in fashion than it formerly was, and it was exercised very gracefully and charitably on Mr. O'Conor's behalf by his very eminent professional brethren. But the present generation of lawyers, who know nothing of him, should learn him as he was, not only as to his virtues and talents, which were great and unusual, and which we endeavored to celebrate in the sketch as a whole, but also as to his weaknesses and unpleasant traits, which were public and troublesome. Mr. O'Conor would himself have despised flattery, at least *post mortem*, and would much have preferred justice. He never flattered anybody, nor probably meant to do anybody injustice, but it is his biographer's proper office to describe him as he was, and not as his contemporaries and admirers could wish he had been. Such a life as his is valuable as an example to be imitated in many particulars, to be avoided in some, and it should be fully and fairly summed up. In a later notice the "Tribune" writer says that "Some old grudge or some constitutional defect must render it impossible for Mr. Browne fully to appreciate the subject of the sketch." We are not old enough to have any such grudge, and the constitutional defect is simply an incapability of indiscriminate and fulsome eulogy. We wish to protest against the sentimental notion that a biographer should slur over unpleasant things which were of great public importance and notoriety, and dwell at length only on the favorable aspects of a character. We did not make Mr. O'Conor, we simply find him. The "Tribune's" criticism strikes us as being as ill-founded as would be a complaint of a Chauvinist that Lanfrey's or Taine's observations on Napoleon are "unpleasant reading." This mistaken estimate of the biographer's office is also adopted by Miss Munroe, the woman who wrote that ode on the opening of the Columbian Exposition, in a criticism on Professor Woodberry's recent Memoir of Poe, in the "Critic." That memoir is a very temperate but very truthful statement of the career of that most wayward genius; but Miss Munroe sharply rebukes the writer for his want of "sympathy" with the subject, and for furnishing so much "unpleasant reading." Perhaps Miss Munroe writes the "Tribune" paragraph — it is exactly in her vein. Mr. Woodberry's sketch is "unpleasant reading," but then he did not make Poe. We felt warranted in replying to Miss Munroe in the "Critic," as follows: —

> "His is an ungrateful task. To blame him for want of 'sympathy' with his subject is like demanding of the stage-villain that he should 'assume a cheerful expression.' The hard facts of Poe's unprincipled life do not leave much room for the play of sentiment or sympathy. The 'mystic harmonies' must be listened for in the man's writings, and not in his life. . . . The more 'Philistines' like Woodberry and Leslie Stephen, who dare to tell the truth, the better for biography; and the sooner the world is disabused of the notion that vice is in any degree vindicated by genius, the more sensible and the better the world will be. Let us give fewer bouquets and Thanksgiving turkeys to felons and have less sympathy with bad men because they wrote pleasing verses and stories."

Leslie Stephen will be remembered as the writer who dispelled the Alexander Pope legend, and showed him up as the spiteful little liar and backbiter that he was. Like him, we believe in painting Cromwell with his wart.

We had forgotten to include in the sketch of O'Conor a pretty touch found in Richard Grant White's "England Without and Within," recorded in his account of a visit to Leicester's Hospital at Warwick, where one of the brethren "showed me a little piece of embroidery worked by poor Amy Robsart. It was framed and hung up against the wall. The frame, he told me, had been paid for by 'a gentleman in America,' of whom I probably had never heard, 'one Mr. Charles O'Conor, a great lawer.' Mr. O'Conor had seen it 'laying araound loose,' and for Amy Robsart's sake had furnished a frame for its proper preservation."

Inns. — While investigating the law of innkeepers, recently, the Chair man has come across much good reading. Among the most interesting of it is the celebrated opinion of Chief Justice Daly in Cromwell *v.* Stevens, 2 Daly, 15, on the subject of inns and the distinction between them and boarding houses. It amounts to a very considerable monograph on the subject, the most complete to be found in the law books and hardly equaled anywhere else.

Inns have been a favorite subject among novelists, poets and painters. Of modern novelists Dickens is the richest in the treatment of them, and several inns of England have been rendered famous (not infamous) by his pen, and have become favorite pilgrimages of his admirers. Dickens is a master of gastronomy and frequently serves up very toothsome repasts to his creatures at these places, and makes his readers' mouths hunger and thirst for his fictitious food and drink. Of course everybody is familiar with Shenstone's praise of the inn, with Archbishop Leighton's desire to die at an inn, and with Doctor Johnson's declaration that "There is nothing which has as yet been contrived by man, by which so much happiness is produced as by a good tavern or inn." One can easily believe that the Doctor was sincere if Boswell was correct in his narration, that he took two young women from Staffordshire, "pretty fools" he called them, to dine at the "Mitre," and after dinner he put one of them on his knee, and fondled her for half an hour together. Rossetti has depicted this scene on canvas, in which, with his customary awkward perspective, he has made Boswell's head nearer the Doctor's than that of the prim-looking maiden who sits on Ursa Major's knee. Falstaff, who certainly was an expert in the matter of taverns, was of opinion that he was entitled to take his ease in his inn, and he brought Dame Quickly into some trouble by his fascinations exercised at her house. What can be more seductive than the pictures of inns and inn stables by the Dutch painters? In a recent English book, entitled "Coaching Days and Coaching Ways," exquisitely illustrated, one gets a charming impression of the old English inns, and the incidents of stage-coach travel, before the railroads, Mr. Ruskin's abhorrence, came in to spoil all the romance of the road and the traveler's temporary home.

One of the earliest allusions to taverns is that to "the Three Taverns," in Acts xxviii. 15. This was a station on the Appian road, along which St. Paul traveled on his way from Puteoli to Rome. Some years ago Col. Ingersoll made a very amusing argument in the New York Court of Appeals, on the question whether strong drink came within the description of "entertainment" which an innkeeper was bound to furnish travelers at table, and might lawfully furnish without a license to sell liquors. He made an argument that entertained the Court and the Bar, and he produced quite a strong impression by citing St. Paul's observation in coming in sight of the Three Taverns—"he thanked God and took courage" —at the sight of the Taverns, as the witty Colonel would have it. But he, like another famous adversary of religion, "wresteth the Scripture to his own destruction," for Paul was not so fond of taverns as this would indicate. What the Apostle said, was: "And from thence," i.e. Rome, "when the brethren heard of us, they came to meet us as far as Appii Forum and the Three Taverns; whom when Paul saw, he thanked God, and took courage." It was the sight of the brethren, and not of the taverns, that made Paul thankful and courageous.

It was a serious question in Paul's day, and indeed until within this century, whether travelers ought to thank God and take courage, or pray God and lose heart at the sight of an inn, for the innkeepers were very frequently, either by choice or from necessity, a very bad class of men, in league with the highwaymen, thieves and robbers who infested the country and the roads, and followed their victims to and from the inns. Charles Reade, in "The Cloister and the Hearth," gives a terrible idea of the dangers of the inns and of those scoundrel innkeepers who, like Macbeth, "murdered sleep." Dumas, in "Twenty Years After," speaks of innkeepers as "that particular class of society, which, when there were robbers on the highway, was associated with them, and since there are none, has advantageously replaced them." One takes keen pleasure in reading how Porthos' servant, in "The Three Musketeers," lassoed the landlord's fine wine out of the cellar window and served it up to his master, and how Athos barricaded himself with his servant in the cellar of the inn in which he was attacked, and successfully resisted siege for a fortnight, meantime eating and drinking the landlord's best provision, to his landlord's despair and his own fattening.

It was this state of society that led the common

law in those disturbed times, to impose on innkeepers the character of insurers of the guests' property against everything but the act of God and of the public enemies. Exactly why the innkeeper should even then have been subjected to liability for inevitable accident without his fault, as for example, a fire which consumed the goods of the guests without any possible advantage to his coffers or the pockets of confederates, it is difficult to understand. But this ancient dogma of the law, although the reason for it has long since disappeared, is still prevalent, except where statutes have come to the innkeepers' relief. The opinion of the New York Court of Appeals, by Porter, J., in Hulett *v.* Swift, 33 N.Y. 571, did much to fasten the old doctrine of accidental fires on the modern conditions, and was a sad contradiction of the boasted elasticity of the common law and its adaptability to the changed conditions of society; and it led to the enactment of statutes of relief in that state.

It is delightful to read of the warmth, sociability and cheer of the old rural inns of England. On the continent those in the large cities and towns are uniformly excellent. In this country such hotels generally furnish good fare and lodging, and frequently, as in the case of the great and new hotels in New York, put the traveler up in a style of palatial magnificence, but the price of it suggests that the landlord is in a hurry to pay off a mortgage or retire from business. Then there is usually to be encountered and survived the stony stare of the clerk when the guest wants something at a daily rate less than the compensation of a congressman or a judge. Leighton would not have desired to die in one of these, but rather before he got into one. As for the country inns in this land, they are much as they were in 1789, when Washington recorded in his Diary of his tour in New England, that going through Connecticut, he "stayed at Perkins' tavern, which by the bye is not a good one." The lawyer, even in these days, who goes upon the rural circuits, recalls with horror the stuffy chambers, the whitewashed walls, the horsey barroom, and the table reeking with fried things and furnished with thick and chipped earthenware and forks with the silver almost worn off. And then the beds! There is a classic saying that when a man is indignant he writes poetry, and once on such an occasion the present writer was so angry that he burst into verse — had a fytte of anger, so to speak — as follows:—

A BED IN A COUNTRY INN.

CONCEIVE the pangs that the Procrustean guest,
Or Damiens on his dreadful bed of steel,
Or cramped Ginevra in her oaken chest,
Or Lawrence on his hot gridiron might feel!

Couches like theirs could hardly give less ease
Than those which furnish many a country inn,
Buzzed round by flies and gnats, lively with fleas,
Restless as consciences not seared by sin.

Contrived with lofty ridge adown the middle,
Like fell sea-serpents' vertebræ serrated,
Contracted as the highest string of fiddle,
Lumpy like life-preservers full inflated.

Dreaming of falling from the Pyramid
Into the crocodile-infested Nile;
Or from some sharp-topped peak the Alps amid,
Into an icy, deadly, dark defile;

Sore toiling up the treacherous steep again,
Like Sisyphus, with his moss-shunning stone,
Or bumpkin clinging to greased pole in pain,
The weary sufferer may wake and groan.

Dire engine of a parsimonious host,
To murder sleep! I rise betimes soreheaded;
With aching limbs and looking like a ghost,
Depart with hatred in my soul imbedded.

NOTES OF CASES.

CONTRACTING FOR FRAUD. — The law has always sternly set its face against the doers of iniquity and fraud. This lofty moral idea has so worked upon the sensibility of judges that it has caused them to break forth into Latin. Thus chief justice Wilmot, in the famous old case of Collins *v.* Blantern, 2 Wils. 341, exclaimed as to such, "*Procul, O! procul este profani!*" and in Gibson *v.* Minet, 210 Bl. 586, we find:

"Nec lex est justior ulla
Quam necis artifices arte perire sua."

This being so, it seems a little strange that modern courts should doubt for a moment about the impolicy of recognizing a contract by which the parties agree to take no advantage of and ask for no relief from one another's fraud. The question first arose, so far as we know, in Universal Fashion Co. *v.* Skinner, 64 Hun. 294. The plaintiff sued on a written contract embracing a clause stating that its stipulations contained the whole contract, and that no other terms should bind either party. The answer admitted the contract, but set up fraud and false representations by plaintiff's agent in the procuring of it. On demurrer, the answer was held good, O'Brien, J., dissenting, observing, "Where the parties themselves stipulate that the writing contains the whole contract, it is difficult to see upon what theory contemporaneous oral agreements or representations are admissible to vary a written contract." But Andrews, J., said, "An agreement that the plaintiff shall not be liable for the fraud of its own agent . . . cannot be enforced." Van Brunt, J., said the provision added

nothing to the force of the contract, "as the law implies the same." But in this he was clearly wrong, for the law does not make any such conclusive implication. In the absence of fraud the parties certainly could lawfully agree that the writing contained the whole contract and should not be added to or changed by parol. On the other hand, in Tallis *v.* Jacson, '92, 3 Ch. 441, the court refused to upset a building contract because it contained a stipulation that the arbitrator's certificate should be conclusive, and "should not be set aside for any pretense, charge, suggestion, or insinuation, of fraud, collusion, or confederacy." On this the "Law Quarterly Review" remarks: "No doubt it concerns society that fraud should not go unpunished, but the maintenance of contracts concerns it much more. 'If there is one thing,' said Jessel, M. R., in Printing Co. *v.* Sampson, 19 Eq. 464, 'which more than another public policy requires, it is that men of full age and competent understanding, shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice,' and Chitty, J., fully indorses the sentiment in Tallis *v.* Jacson, which case was itself an eminent illustrarion of the evil of interfering with contracts; for had the contract been annulled and the certificate set aside, it would have reopened thousands and thousands of items of account, each item a battleground, and this merely for the sake of some problematic or possible fraud. Such a clause, as Chitty, J., said, 'looks terrific to a lawyer,' because law being based on distrust treats everybody as a probable knave. Business men do not. Hence they accept such clauses and show their sense in doing so; for their optimistic estimate of men is much nearer the truth than the pessimistic one of law."

The question came up very recently in Bridger *v.* Goldsmith, New York Court of Appeals, October, 1894 (38 N. E. R. 458), where a sealed contract of sale of a business contained the following clause:

"It is expressly understood and agreed between the parties hereto, that the said party of the first part has not, in any manner or form, stated, made, or represented to the said party of the second part, for the purpose of inducing the sale of the said business or the making of this agreement, any statements or representations, verbally or in writing, in any respect to the said business, other than that the said party of the first part has been engaged in the piano business in the City of New York since 1867."

It was nevertheless held that the party of the second part was not precluded from proving fraudulent representations by which he had been misled.

"I assume that the fact that a seal was unnecessarily affixed to an agreement for the sale of personal property cannot affect the rights of the parties. Every defense is open to either party that would have existed in case the writing was unsealed. It appears that after the negotiations had been completed and the agreement drawn, the defendant stated, in the presence of the plaintiff, and the counsel for both parties present, that he wanted a clause of this character inserted. The plaintiff's counsel at first objected to it. The defendant's counsel suggested that it would make no difference, and the plaintiff consented that it might be put in. There is evidence in the case tending to show that the plaintiff voluntarily assented to this stipulation, after having been advised by his counsel that it would have the effect of precluding him from subsequently alleging fraud in the transaction, even though it existed in fact. This provision is not a 'covenant,' in any proper sense of that term. Indeed, it can scarcely be considered as any part of the agreement at all. It does not relate in any manner to the subject-matter of the contract. It was a mere statement in the nature of a certificate as to a fact. It did not relate to the property, or to the terms of the sale or the payments, but to the absence of all fraud from the transaction. The clause cannot be given any greater effect than if it had been written upon a separate paper after the execution of the contract, and signed by the parties. The question now is whether it can be given the effect claimed for it by the learned counsel for the defendant—to preclude the plaintiff from alleging fraud in the sale, and pursuing in the courts the remedies which the law gives in such cases. It cannot operate by way of estoppel, for the obvious reason that the statements were false to the defendant's knowledge. He may indeed have relied upon its force and efficacy to protect him from the consequences of his own fraud, but he certainly could not have relied upon the truth of any statement in it. A mere device of the guilty party to a contract, intended to shield himself from the results of his own fraud practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on the part of the plaintiff that however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. I assume that there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such case as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing. It is agreed that, whatever may be said about the fraudulent character of the sale itself, this

particular clause was a bargain fairly made and deliberately entered into by the plaintiff, with full knowledge of its purpose, scope and effect, and therefore the plaintiff should be held to abide by it. But it is not correct to say that even with respect to this clause, the parties dealt with each other at arm's length. The defendant, when suggesting it, had the advantage of his secret knowledge that its statements were false, while the plaintiff, on the other hand, relying upon the truth of the representations made as to the extent and character of the business, was not upon his guard, but assuming that the defendant has told him the truth, was readily induced to sign a statement, which, upon such assumption was obviously of no consequence. In fact, it was but a link in the chain, and the crowning act which was to secure to the defendant the full fruits of the fraud, and thus enable him not only to overreach the plaintiff, but the law itself."

This seems good morals, and it ought to be good law. It certainly seems against public policy to allow parties to bargain for immunity for fraud. It resembles the case of a man selling goods expressly for and to assist actively in an illegal business, and the buyer agreeing not to raise that defense in an action for the price of the goods.

HUSBAND'S LIABILITY FOR COUNSEL FEES OF WIFE IN DIVORCE SUIT.— An interesting question of the liability of the husband, at common law, for counsel fees of his wife in her action for divorce, is recently decided in Wolcott *v.* Patterson, Michigan Supreme Court, 24 Lawyers' Rep. Ann. 629. The court holds that the husband is not liable, and consequently that the wife may make herself liable. This is put on the ground that the statute "clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by the husband." The court, however, observe that aside from the statute "the authorities are not uniform upon the question, but we think the weight of authority negatives such liability. In some of the states the liability of the husband is asserted. Sprayberry *v.* Merk, 30 Ga. 81, 76 Am. Dec. 637; Porter *v.* Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Langbein *v.* Schneider, 27 Abb. N. C. 228; and in these jurisdictions it is held that the wife is not competent to charge herself with such expenses. Musick *v.* Dodson, 76 Mo. 624, 43 Am. Rep. 780; Cook *v.* Walton, 38 Ind. 228; Whipple *v.* Giles, 55 N. H. 139. See however a dissenting opinion of Pettit, Ch. J., in Putnam *v.* Tennyson, 50 Ind. 461. We think the cases which deny the husband's liability are more consonant with the holdings of this court, that one who supplies the wife with goods apparently suitable to her situation in life does so at his peril, and can only recover if the husband has failed to supply necessaries. Clark *v.* Cox, 32 Mich. 204." In an extensive and valuable note in 24 L. R. A. 629, it is said: "Counsel's fees have been looked upon and considered in the light of necessaries, for which the husband would be liable, as upon an implied contract, in Massachusetts, New Hampshire, while the contrary has been held in Alabama, Connecticut, Illinois, Iowa, and West Virginia." We find that the husband's liability has been denied in Shelton *v.* Pendleton, 18 Conn. 417; Clarke *v.* Burke, 65 Wis. 359; 56 Am. Rep. 631; Pearson *v.* Darrington, 32 Ala. 227; Ray *v.* Adden, 50 N. H. 82; Morrison *v.* Holt, 42 N. H. 478; 80 Am. Dec. 120; Coffin *v.* Dunham, 8 Cush. 404; Dow *v.* Eyster, 79 Ill. 254; Peck *v.* Marling, 22 W. Va. 708; Wing *v.* Hurlburt, 15 Vt. 614; 40 Am. Dec. 695; Williams *v.* Monroe, 18 B. Monr. 514; Johnson *v.* Williams, 3. G. Greene, 97; 54 Am. Dec. 491 (Iowa); while the husband's liability has been asserted in Porter *v.* Briggs, 38 Iowa, 166; 18 Am. Rep. 27; overruling Johnson *v.* Williams, *supra;* Musick *v.* Dodson, 76 Mo. 624; 43 Am. Rep. 780; Sprayberry *v.* Merke, 30 Georgia, 81; 76 Am. Dec. 637; Cook *v.* Walton, 38 Ind. 228; Langbein *v.* Schneider, 27 Abb. N. C. 228. The case of Conant *v.* Burnham, 133 Mass. 503; 43 Am. Rep. 532, is not at all in point, although cited by courts and text writers, for it related to the husband's liability for counsel fees in defence of his wife on a complaint against her for being a common drunkard. It appears to us that the true reason of the matter is expressed in Morrison *v.* Holt, *supra*, as follows: "The wife's authority, where it exists, arises from the relation, if not as an incident essential to its preservation, certainly as a consequence of its continued existence, and not as a power reserved for its destruction."

THE YEW-TREE DOCTRINE. — Several years ago we metrically reported in this magazine the celebrated case of Crowhurst *v.* Amersham Burial Board, 4 Ex. Div. 5, in which it was held that if A. maintained on his land a yew tree, whose branches projected over the boundary between his land and that of another person, and that person's horse, on his land, cropped the projecting branches, which are poisonous to horses, and died in consequence, the horse's owner could recover against the owner of the tree. Now that decision has been recently distinguished in Ponting *v.* Noakes (1894), 2 Q.B. 281, an action brought to recover damages for the death of a horse, caused by eating the leaves of a yew tree growing on the defendants' land. The tree grew near the boundary of the defendants' land, which was separated from the plaintiff's by a fence and a ditch belonging to the defendants, the plaintiff's boundary

being on the farther side of the ditch. There was no obligation on the part of the defendants to fence against their neighbor's cattle. The plaintiff's horse ate the branches of the yew tree, which extended over the fence and partly over the ditch, but not over the plaintiff's land. The Divisional Court dismissed the action, holding that there was no liability on the part of the defendants, and that there was no duty on them to take means to prevent the plaintiff's horse from having access to the branches of the tree. It was attempted to bring the plaintiff's case within the doctrine of the well-known case of Fletcher *v.* Rylands, 3 H.L. 330, but the court agreed that it did not apply, because the tree was wholly within the defendants' land. The true test was held to be that pointed out by Gibbs, C. J., in Deane *v.* Clayton, 7 Taunt., at p. 533, where he says: "We must ask, in each case, whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless the element of intention to injure be present, as in Bird *v.* Holbrook, 4 Bing. 628, or of nuisance, as in Barnes *v.* Ward, 9 C. B. 392) no action is maintainable.

DIVORCE — PROHIBITION OF REMARRIAGE — EXTRA-TERRITORIAL EFFECT OF STATUTE. — It was settled by Van Voorhis *v.* Brintnall, 86 N. Y. 18; 40 Am. Rep. 505, that the prohibition of remarriage in the New York statute of divorce has no extra-territorial effect, and that where the prohibited party went to another state, whose divorce statute contained no corresponding prohibition, for the express purpose of evading the New York decree, and there remarried, and then returned to reside in New York, the marriage must be recognized as valid in New York. This doubtless is the general doctrine. A curious question would arise as to the effect of a remarriage in another state whose statute *did* contain a similar prohibition. Would that be recognized as a valid marriage in the state where the decree was pronounced? We think it would. It would be valid in the state where celebrated, because no decree of that state forbids it. It would be valid in the state where the decree had been pronounced because it would not be a disobedience of that decree, on the ground that such decrees have no extra-territorial effect. It could not be disregarded save on grounds of comity. A case in point is the recent one of Hernandez, 46 La. Ann. 24 L. R. A. 831 (with notes). The official headnotes are as follows:

"The prohibition of article 161 of the code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.

"The prohibition of the statute of New York, to the effect that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extra-territorial effect, being a penal statute; and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and State of New York, — the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there."

LARCENY BY HUSBAND FROM WIFE. — In Bearley *v.* State, decided in the Supreme Court of Indiana, in September, 1894 (38 N. E. R. 35), it was held that if a husband takes his wife's personal property, under circumstances which, were he a third person, would constitute larceny, he is guilty of that crime. The court said:

"The learned Judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts, and doing whatever a *feme sole* might do, and that the effect of such statutes is to sever the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes, a woman may hold her own property, make her own money, enter into her own contracts, pay her own debts. She may even contract with her own husband. If he defrauds her, she may recover. If a woman may contract, under these statutes, with her husband, and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation. Under the enabling statutes of Indiana, the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them."

The court cited Ganett *v.* State, 109 Ind. 527, where an indictment was sustained against the husband for arson of his wife's dwelling-house, as the property of "another person," although they both dwelt in it. Good, sound sense!

The Green Bag.

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The Editor will be glad to receive contributions of articles of moderate length upon subjects of interest to the profession; also anything in the way of legal antiquities or curiosities, facetiæ, anecdotes, etc.

THE GREEN BAG.

OUR "Disgusted Layman" offers a few more noteworthy comments as the result of his observations during a recent visit to Tennessee.

Editor of "The Green Bag."

DEAR SIR:—I was down at Knoxville, Tenn., about a month since, on some lawsuit business (I am brevet lawyer of our concern), and being thrown in company of lawyers constantly, was rather impressed with two incidents connected with courts, that struck me as interesting, yet would be passed over by you in consequence of your not knowing the inner histories of them. One was the assassination of a judge (a "Chancellor" I think they called him) by the clerk of his court, what they always call "Clerk and Master." The mere assassination was nothing of general or fundamental interest, but the underlying causes were very peculiar and striking, It seems that this Chancellor is only paid $2,500 per year; he holds forth in the capital of the state, his office is a rather high one and he must live in some sort of style; yet it is evident he cannot do it on $2,500 per year. Now he has the appointment of the "Clerk and Master" of his court, which office is worth over $20,000 per year. This particular Chancellor seems to have made a bargain with his Clerk and Master, that the fees and profits of the latter's office should be divided between them. This is the striking feature, that a judge only paid $2,500 per year has the appointment to office where it pays five times as much, and I understood that the practice of making such a division of profits was thought to be common and the rule.

What a shocking commentary on "judicial dignity"? I think that this Chancery Court has charge of sales of property, settlement of bankrupt estates, etc., what is called sheriff's sale in this state, and the clerk of the court is master in such proceedings; I attended the sale of the property we had a lien on, and there was nothing said about the sheriff, it was all "the Clerk and Master." The additional incidents, that the assassinated judge had not only got half the clerk's profits, but had borrowed money in addition that the clerk had borrowed from others, and that he intended to appoint his son clerk instead of the former creditor one, are superfluities to the main point that a judge has to eke out his living by such methods.

An amusing incident that came out while I was there, was some fellow in Knoxville, who had been convicted of bigamy and sentenced to imprisonment, applying to the Supreme Court for a stay of his going to jail, or penitentiary (whichever it was), until he could apply to the governor for a pardon. That struck me as immensely cheeky, but when I read the long-winded opinion of the Supreme Court, that the fellow had been guilty of a very heartless seduction, and had married the girl just to save her character, had deserted her and subsequently, in a different state, had married agan, on the ground that his first marriage was only "a form," it was immense. What struck me as the joke was, that by his application to the Supreme Court, he was making it certain that the decision of the court would either be a strong support of his application for a pardon, or a tremendous argument against it, and as the court sat down on him and called him some pretty hard names, showing that the only plea he set up was his "respectable character" and his cool assumption that he was at liberty to determine for himself how binding his first marriage was, it seemed to me that the Governor would have to have an immense amount of nerve to pardon a man after the Supreme Court saying he wasn't entitled to even a temporary relief from imprisonment. You might be both amused at and interested in these two matters.

Yours truly,

A DISGUSTED LAYMAN.

LEGAL ANTIQUITIES.

ROGER NORTH gives an instance of the lawyer's attachment to mere forms. In his day the Court of Common Pleas used to sit in Westminster Hall, close to the great door, in order that suitors and their train might readily pass in

and out. When the wind was in the north, this situation was found very cold, and it was proposed to move the Court further back, to a warmer place. "But the Lord Chief Justice Bridgman," says North, "would not agree to it, as it was against Magna Charta, which says that the Common Pleas shall be held *in certo loco*, or in a certain place, with which the distance of an inch from that place is inconsistent, and all the pleas would be *coram non judice*. That formal reason hindered a useful reform; which makes me think of Erasmus, who having read somewhat of English law, said that the lawyers were *doctissimum genus indoctissimorum hominum*."

FACETIÆ.

Daniel C. Pomeroy was a criminal lawyer of great prominence throughout New York State, and conducted during his career the defense of thirty-seven murder cases, and not a single client ever reached the gallows. He had a son in whom he took great pride, and who promised to become a chip of the old block. The young man shortly after his admission as an attorney, thought it would be funny to "sit in" with a lawyer at a trial and assist him against the "old man." He made numerous objections during an examination of witnesses by his father, until the latter lost patience, and turning upon him said: "Dick, you either keep still after this, or I'll send for the hired girl to take you home and put you in bed." Dick subsided.

Pomeroy was a stage driver on the old Butterfield line, and gleaned his legal education largely upon the box seat of his coach or while change of horses was being made at the stations. He was associated with others in defense of one Mrs. McCarty, on her trial at Utica for the murder of a man named Hall, of Ogdensburg, who was killed by a bullet from her revolver, which was aimed at another man. Judge Doolittle presided at the trial, and seemed to believe in the prisoner's guilt. The Judge was bitter, and so was Pomeroy. The latter made an objection and insisted upon it rather strenuously. "Mr. Pomeroy," said the Judge, "I am not a horse, and can't be driven." "Well, your Honor, I learned in my early experience to drive mules, and I will try to keep up my former good reputation."

A Lawyer defending a promissory note case went to lunch leaving his books and citations on the table in the court-room. The opposing counsel sneaked back into the room and changed the place of all his bookmarks. In the afternoon the lawyer, taking up his books, referred the court to his authorities. His lordship noted every volume and page carefully, and took the case under consideration. In rendering his opinion he said:—

"I was inclined, after hearing the argument of counsel for defendant, to nonsuit the plaintiff; but I find, on referring to the authorities quoted by counsel, none of them bears on this case, and I am led to think that the gentleman has willfully been trying to insult the court. He has referred to an action of an Irishman who sued the proprietor of a monkey for damages for biting him; to a case of arson, one of burglary, two of petty larceny and three divorce cases, none of which bears on an action to recover on a promissory note. Perhaps the grossest insult to the court is referring to 'Duckworth *vs.* Boozyman,' an action charging defendant with breach of promise. Judgment for plaintiff, with costs."

The lawyer never knew what the matter was, and to this day thinks the judge was out of his mind.

Lawyer (in a whisper).— Here comes the jury. Ten to one they'll acquit you.

Client (after listening to the verdict). — It seems to be twelve to none they don't.

The following is vouched for as an actual fact. — A lecturer on Criminal Law at one of our law schools, in tracing the history of Criminal Law, quoted: "Whosoever sheddeth man's blood, by man shall his blood be shed." Genesis ix. 6.

Not long afterwards a member of the class was hunting the library diligently for a copy of "Genesis Reports." It is unnecessary to add that he was unable to find the citation under that title.

NOTES.

The legal whirligig of time has brought a curious revenge through the recent New York election. Three years ago a young lawyer named John W. Goff, in defending an indicted client be-

fore Recorder Smyth, was fined for contempt of court. This consisted in advising his client not to arise for identification by a witness on order of the court — the counsellor taking the point that this was compelling the client to be a witness against himself. Now on New Year's Day, the disciplined young lawyer succeeded the disciplining judge.

ANOTHER and more curious instance of this whirligigging took place in the same city and state some years ago. Early in the civil war time, a young lad named James O'Brien was sentenced to the penitentiary for an alleged riotous act — that however was really a boyish bit of disorder — by Recorder Barnard. Twenty years later the young lad had served as sheriff, and next became a state senator. The Recorder had become a Supreme Court Judge, and as such being impeached, came up for trial before the senate of which James O'Brien was a member. And his vote aided in consigning his former judge to dishonor.

JUDGE WALTER CLARK of the Supreme Court of North Carolina is evidently level-headed. Called upon at the late election to further state his position, he disposed of his questioner by the remark: "I understand five different languages, and I know how to be silent in each of them." Silence proved to be golden to him, for as a consequence he received 100,000 more votes than were ever cast for any man in the state.

A SON of the late Sir Frederick Pollock, the last Chief Baron of the English Court of the Exchequer before its merging into the Supreme Court of Judicature, is soon to visit the United States. He much resembles his father, who in his day was regarded as the most distinguished looking of all his judicial brethren. Like a once renowned justice of the United States Supreme Court, the venerable Chief Baron took a nap pretty regularly about mid-day. His waking was comical. For when his "forty winks" ended he would start to seize a pen and with imperturbable gravity say to the arguing counsel, "What page was your last citation?" The harmless deceit was humored by the Bar, and only once did it provoke tartness. This came when an old serjeant retorted, "Did your lordship refer to the last citation made before your lordship gave Somnus a new trial, or the citation I made when your lordship produced a gap in my argument." Nothing nettled, Baron Pollock imperturbably answered, "The one immediately succeeding the gap."

Upon another occasion a young barrister from a provincial circuit about to make a suggestion regarding an infant heir remarked, addressing Sir Frederick, "I assume that your lordship is a married man and"; — but before he concluded the sentence the Chief Baron with a merry twinkle in his eye at the assembled Bar responded: "It would not be a violent assumption, for I have five great-grandchildren, and the total number of my descendants is eighty-five." A witty barrister present whispered, "Sir Frederick is quoting Pollock's 'Course of Time.'"

A BLACKSMITH of a village in Spain murdered a man, and was condemned to be hanged. The chief peasants of the place joined together and begged the Alcade that the blacksmith might not suffer, because he was necessary to the place, which could not do without a blacksmith to shoe horses, mend wheels and such offices. But the Alcade said, "How then can I carry out the law?" A laborer answered, "Sir, there are two weavers in the village, and for so small a place one is enough! you may hang the other."

LO! THE POOR LAWYER.

AT Halifax, that quaint old city,
There dwelt a lawyer whose renown
For crafty, subtle, fox-like cunning
Spread far beyond his native town.

Like lawyers everywhere, he oft
Found clients who were far more free
To enter into suit of law
Than pay their lawyer's well-earned fee.

An Indian, of the Miami,
For service rendered long ago,
Indebted was to him, and seemed
Contented well to leave it so.

The lawyer waited long; at last
His patience bore no longer strain,
With process, judgment, execution,
He threatened, nor was it in vain.

"Poor Lo" got scared and paid the money,
But lingered after he had paid;
"Why do you wait?" the lawyer asked,
"Me want receipt," the Indian said.

"Receipt!" the limb of law rejoined,
"What know you how these things are done?
Tell me the use of a receipt
And I'll be pleased to give you one."

The red man stood a moment, then
With merry twinkle in his eye,
He said, "S'pose now me sick, me die,
Me go to Heben by an' by;

"The 'Postle Peter come an' ask,
'Ol' Simon, what you want?' me say,
'Want to git in'; an' den he ask,
'You pay dat bill to Lawyer J.?'

"What den me do? Hab no receipt,
Me must go out to find you. Well—
Me fool hab been—to find you den
Me must go hunt all over h—."

—J. A. DREISS, *in The Bohemian.*

LITERARY NOTES.

THE Rev. Samuel J. Barrows, D.D., the editor of the CHRISTIAN REGISTER, and a member of the Board of Prison Commissioners of Boston, contributes a paper to the February ARENA on "Penology in Europe and America," that will be widely read by all who appreciate the value of educational work in prison discipline and reform as an important factor in the social problem. Dr. Barrows is one of the leading authorities in this country on the department of sociology known as Penology, and this paper is the result of a year's travel in Europe, during which he visited all the representative prisons of England, France, Germany, Italy, Hungary and Greece.

TWO articles in the February ATLANTIC will attract especial attention. "The Study of a Mob," by Boris Sidis, a Russian, in which the data are taken from Russian life, and "Russia as a Civilizing Force in Asia," by James M. Hubbard, which presents the other side of the shield

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GENERAL Lord Wolseley makes a most important contribution to the literature of the China-Japan war. In an article in the February COSMOPOLITAN, he discusses the situation and does not mince matters in saying what China must do in this emergency. Two other noted foreign authors contribute interesting articles to this number. Rosita Mauri, the famous Parisian danseuse, gives the history of the ballet, and Émile Ollivier tells the story of the fall of Louis Philippe. From every part of the world, drawings and photographs have been obtained of the instruments used to torture poor humanity, and appear as illustrations for a clever article, by Julian Hawthorne, entitled, "Salvation via the Rack."

MR. E. V. Smalley contributes to the February REVIEW OF REVIEWS an interesting study of civil government in Manitoba, under the title, "Canada's Prairie Province." His account of the institutions of this little-known government on our northern border is extremely enlightening and suggestive. The article is well illustrated.

THE leading article in the February number of THE BOSTONIAN is entitled, "How Washington's Birthday was made a Holiday," in which Mr. Walter G. Chase has furnished letters from Washington Irving, Charles Sumner, Wendell Phillips, Franklin Pierce, and others, as well as the original ode by Oliver Wendell Holmes which directly bore upon the subject.

A MURDER and robbery committed in an express-car on the Rock Island Railroad some years ago, gave the detectives one of the hardest cases they have ever had to deal with. The Pinkerton detective story in MCCLURE'S MAGAZINE for February is a history of this crime, and of the ingenious and patient methods by which the perpetrators were finally brought to arrest and conviction.

IN an article entitled "What is Gambling?" Hon. John Bigelow, in the February HARPER'S discusses an important constitutional amendment lately adopted by the people of the State of New York. The amendment indirectly affects horse-racing and pool-selling in other states, owing to the burning interest in the subject. Whether it affects the twenty-five-cent rubber at whist and the church fair is a problem that Mr. Bigelow propounds in entertaining fashion.

IN SCRIBNER'S MAGAZINE for February, Noah Brooks continues his group of papers on "American Party Politics," with an account of the typical vote of a party, as illustrated by the period from Jackson to Pope—the central idea being the rise and growth of the slavery problem. It is entitled, "The Passing of the Whigs."

A VARIED and attractive table of contents is offered by the POPULAR SCIENCE MONTHLY for February. Chief among the important articles are "The Serum Treatment of Diphtheria," by Dr.

Samuel T. Anderson; "The United States Geological Survey," by Charles D. Walcott; "Brain Development as Related to Evolution," by Hon. G. Hilton Scribner; and "Some Material Forces of the Social Organism," by Prof. John W. Langley.

THE leading feature of THE CENTURY continues to be the "Life of Napoleon," by Prof. William M. Sloane, which, in the February number, reaches the topic of Bonaparte's first military success. After describing the rather shifty policy of Napoleon in relation to the Revolution, Prof. Sloane recounts the circumstances surrounding the famous pamphlet, "The Supper of Beaucaire," and then takes up Napoleon's decisive success at Toulon, and his appointment as a Jacobin general, thus covering, in all, the larger part of the period from the time of the expulsion of the Bonapartes from Corsica to the marriage with Josephine. The article is finely illustrated.

THE NORTH AMERICAN REVIEW for February opens with three timely and important articles on "The Financial Muddle," written respectively by the Hon. J. Sterling Morton, Secretary of Agriculture, Representative William M. Springer, Chairman of the House Committee on Banking and Currency, and Henry W. Cannon, President of the Chase National Bank of New York and formerly Comptroller of the Currency.

Among the short articles which appear in this number are "Images in Dead Eyes," by Dr. Ellerslie Wallace; "Newspaper Row and National Legislation," by Albert Halstead; Washington correspondent of the "Cincinnati Commercial Gazette." "The Cat in Law," by Gertrude B. Rolfe, and "How to Repel Train Robbers," by Lieut. J. T. Knight, U. S. A.

BOOK NOTICES.

LAW.

A TREATISE ON THE LAW OF RES JUDICATA, including the Doctrines of Jurisdiction, Bar by Suit and Lis Pendens. By HUKM CHAND, M. A., Chief Justice City Court of Hyderabad, Deccan, India. William Clowes & Sons, London, William Green & Sons, Edinburgh, 1894.

This is a truly remarkable work, evidencing a most thorough research and a most exhaustive learning on the part of its distinguished author. Although coming from an East Indian lawyer, the treatise is admirably adapted to the needs of the American Bar, more than one-half of the great number of cases cited being from the United States. We know of no work upon this abstruse subject which displays so complete a mastery of the principles involved. It should find a place in every law library.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL. D. The Bancroft Whitney Co., San Francisco. 1895. Six volumes, $36.00.

This great work of Judge Thompson, which has been for years in preparation, is finally announced as completed, and the first two volumes will be ready for delivery this month, while the others will follow at intervals of two months. We look forward with great interest to the appearance of the work, which promises to be the most remarkable legal publication since Kent's Commentaries. The general contents may be summarized as follows: —

I. Organization and Internal Government. II. Capital Stock and Subscriptions thereto. III. Remedies and Procedure to Enforce Share Subscriptions. IV. Shares Considered as Property. V. Liability of Stockholders to Creditors. VI. Directors. VII. Rights and Remedies of Members and Shareholders. VIII. Ministerial Officers and Agents. IX. Formal Execution of Corporate Contracts. X. Notice, Estoppel, Ratification. XI. Franchises, Privileges and Exemptions. XII. Corporate Powers and the Doctrine of Ultra Vires. XIII. Corporate Bonds and Mortgages. XIV. Torts and Crimes of Corporations. XV. Insolvent Corporations. XVI. Dissolution and winding up. XVII. Receivers of Corporations. XVIII. Actions by and against Corporations. XIX. Foreign Corporations.

The above titles are divided and subdivided into one comprehensive, orderly and complete work, covering every species of corporations, except those created for governmental purposes.

A SYSTEM OF LEGAL MEDICINE. By ALLEN MCLANE HAMILTON, M. D., and LAWRENCE GODKIN, ESQ., of the New York Bar. E. B. Treat, New York, 1894. Two vols. Law sheep.

This work is perhaps the most important contribution ever offered to medico-legal literature. A remarkable array of legal and medical talent has been enlisted by the editors and articles are furnished by such lawyers as Judge Simeon E. Baldwin, B. F. Cardozo, W. B. Hornblower, R. C. McMurtrie, etc., while besides the editor, Dr. Hamilton, on the medical side we find such well known names as Prof. Jas. F. Babcock, Lewis Balch, Francis A. Harris, Ryerson Fowler, B. Sachs, F. R. Sturgis, V. C.

Vaughan, W. T. Gibb, etc. All of these gentlemen may be called experts in the subjects of which they write, and their statements carry more than usual weight and authority. The scope of the work covers almost every conceivable medico-legal topic, and will be found invaluable to all practitioners who are called upon to discuss such subjects. We heartily commend the book to the profession and bespeak for it the cordial reception to which its merits entitle it.

LIFE SKETCHES OF EMINENT LAWYERS, American, English and Canadian. To which is added thoughts, facts and facetiæ. By GILBERT J. CLARK of the Kansas City Bar. Lawyers' International Publishing Co., Kansas City, 1895. Two volumes.

Mr. Clark gives us in these volumes a vast amount of interesting matter concerning the great lights of the American and English Bars. Short biographical sketches, to which are added extracts from speeches and arguments, together with bright anecdotes etc., make up the contents. The work is designed as a key to the admirable photogravure groups of eminent lawyers published by Mr. Clark a year since. The book will be read with pleasure by the profession and should be preserved as a treasure-house of biographical information. The labor involved in the preparation of such a work must have been very great, and Mr. Clark deserves the thanks of his brother lawyers for the bringing together these sketches of such a host of worthies for their delectation.

COMMENTARIES ON THE LAW OF INJUNCTIONS, as determined by the Courts and Statutes of England and the United States. By CHARLES FISK BEACH, JR. H. B. Parsons, Albany, N.Y., 1895. Two vols. Law Sheep, $12.00 *net.*

Mr. Beach is one of the most indefatigable of our law writers, and with hardly an exception his works have deserved high praise. In this treatise on Injunctions, he has given the profession a very useful and practical book, one which will prove of great aid and assistance. The law as it is to-day is fully and carefully stated and the citations are numerous and to the point. It is an admirable working tool and will find favor with both bench and bar. We commend it to the attention of our readers.

MISCELLANEOUS.

THE WOMAN WHO DID. By GRANT ALLEN. Roberts Bros., Boston, 1895. Cloth $1.00.

The English novel of to-day has been the subject of much severe criticism, and this work of Mr. Allen's is likely to receive its full share of adverse comment. Dealing as it does with a question which strikes at the very root of our social system, and advocating through the lips of its heroine the abolition of marriage, the book is one which few will commend. It is however a relief to find that all the heroine's efforts to revolutionize the social status come to naught, and that she, to a certain extent, sees the errors of her ways and expiates them by taking her own life. The story is powerfully written, is of great interest, and furnishes much food for thought, but we wish the author's talents had been exercised in a worthier direction.

RECOLLECTIONS OF SIXTEEN PRESIDENTS, from Washington to Lincoln. By RICHARD W. THOMPSON. The Bowen-Merrill Co., Indianapolis, 1894. Two vols. Sold by subscription only.

It has fallen to Mr. Thompson to enjoy the remarkable distinction of having seen all the Presidents of the United States except Washington and the elder Adams, and to have met and personally known many of them. Mr. Thompson himself, has been a prominent figure in the political history of our country, and consequently anything from his pen demands a more than usual consideration by the American people. We took up these volumes therefore with pleasant anticipations, but found to our regret that *personal* recollections of our Presidents were almost entirely wanting, and that Mr. Thompson had contented himself with giving simply short histories of the different administrations. These are interesting, but they are not what the reader is led to expect from the title of the book. Many of the author's statements will be taken issue with by students of our political history, but we have not the time or space to point out what seem to us to be remarkable assertions on Mr. Thompson's part. The book, as a whole, is well written and very readable, and a valuable acquisition to political history, but the opportunity for making it *the* work of the day seems not to have been availed of by the distinguished author.

BOOKS RECEIVED.

HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By HENRY CAMPBELL BLACK. West Publishing Co., St. Paul.

AMERICAN STATE REPORTS. Vol. XL. Bancroft-Whitney Co., San Francisco.

RULES OF EVIDENCE. By GEORGE W. BRADNER. Callaghan & Co., Chicago.